# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CONSOLIDATED CIGAR CORPORATION; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWISHER INTERNATIONAL, INC.; TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; SWEDISH MATCH NORTH AMERICA, INC.; PLAINTIFFS, APPELLANTS,

V.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT, APPELLEE.

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS, INC.; UNITED STATES TOBACCO COMPANY; PLAINTIFFS.

UNITED STATES, INTERESTED PARTY.

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS, INC.; PLAINTIFFS, APPELLANTS,

V.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT, APPELLEE.

UNITED STATES TOBACCO COMPANY; CONSOLIDATED CIGAR CORPORATION; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.;

SWISHER INTERNATIONAL, INC.; TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; PLAINTIFFS.

UNITED STATES, INTERESTED PARTY.

UNITED STATES TOBACCO COMPANY, PLAINTIFF, APPELLANT,

V.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT, APPELLEE.

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS, INC.; CONSOLIDATED CIGAR CORPORATION; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.; TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; PLAINTIFFS.

UNITED STATES, INTERESTED PARTY.

LORILLARD TOBACCO COMPANY; PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; UNITED STATES TOBACCO COMPANY; CONSOLIDATED CIGAR CORPORATION; GENERAL CIGAR CO., INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.; TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; PLAINTIFFS, APPELLEES,

V.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT, APPELLANT.

UNITED STATES, INTERESTED PARTY.

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS, INC.; UNITED STATES TOBACCO COMPANY; CONSOLIDATED CIGAR CORPORATION; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.; TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; PLAINTIFFS, APPELLEES,

V.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT, APPELLANT.

UNITED STATES, INTERESTED PARTY.

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS, INC.; UNITED STATES TOBACCO COMPANY; CONSOLIDATED CIGAR CORPORATION; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.; TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; PHILIP MORRIS, INC.; PLAINTIFFS, APPELLEES,

V.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT, APPELLANT.

UNITED STATES, INTERESTED PARTY.

CONSOLIDATED CIGAR CORPORATION; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWISHER INTERNATIONAL, INC.; TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; SWEDISH MATCH NORTH AMERICA, INC.; LORILLARD

TOBACCO COMPANY; PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; UNITED STATES TOBACCO COMPANY; PLAINTIFFS, APPELLEES,

V.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT, APPELLANT.

UNITED STATES, INTERESTED PARTY.

Nos. 00-1107, 00-1117, 00-1118 and 00-1270 to 00-1275.

HEARD APRIL 7, 2000.
DECIDED JULY 17, 2000.

James V. Kearney, with whom Latham & Watkins, Peter G. Hermes, Peter C. Netburn and Hermes, Netburn, O'Connor & Spearing, P.C. were on brief, for appellants Consolidated Cigar Corp., General Cigar Co., Inc., Havatampa, Inc., John Middleton, Inc., L.J. Peretti Co., Inc., Swedish Match North America, Inc., Swisher International, Inc. and Tobacco Exporters International (USA) Ltd.

Henry C. Dinger, P.C., with whom Cerise Lim-Epstein, Goodwin, Procter & Hoar, LLP, Verne W. Vance, Jr., John H. Henn, Foley, Hoag & Eliot, Andrew S. Krulwich, Thomas W. Kirby, Daniel E. Troy, William A. McGrath, Wiley Rein & Fielding, Richard M. Zielinski, Robert D. Ryan, Hill & Barlow, John B. Connarton, Jr. P.C., Carol-Lynn M. Bear, Connarton, Wood & Callahan. Clausen Ely, Patricia A. Barald and Covington & Burling were on brief, for appellants Philip Morris Incorporated, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and R.J. Reynolds Tobacco Co.

George J. Skelly, with whom Michael D. Blanchard, Eric S. Sarner and Skadden, Arps, Slate, Meagher & Flom LLP were on brief, for appellant United States Tobacco Company.

Steven G. Brody, Cadwalader, Wickersham & Taft and Gilbert H. Weil on brief, for Association of National Advertisers, Inc., amicus curiae.

Daniel J. Popeo, Richard A. Samp and Washington Legal Foundation on brief, for Washington Legal Foundation, amicus curiae.

William W. Porter, CA, Assistant Attorney General, with whom Susan Paulson, CA, Assistant Attorney General, was on brief, for appellee.

Douglas N. Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, with whom David W. Ogden, Acting Assistant Attorney General, and Donald K. Stern, United States Attorney, were on brief, for the United States, amicus curiae.

Brian Wolfman, David C. Vladeck, Richard J. Whitney, Speir & Whitney, George A. Hacker, Donald W. Garner, Michael L. Ile, Anne M. Murphy and Leonard A. Nelson on brief, for American Medical Association, American Heart Association, American Lung Association, American Cancer Society, Center for Science in the Public Interest, Public Citizen, Inc. and the Massachusetts Medical Society, amici curiae.

Before: TORRUELLA, *Chief Judge*,
BOWNES, *Senior Circuit Judge*, and
LIPEZ, *Circuit Judge*.

TORRUELLA, Chief Judge.

Before the Court is a challenge to regulations promulgated by the Attorney General of Massachusetts which restrict the sale, promotion, and labeling of tobacco

products in an effort to reduce the use of such products by minors. Three groups of tobacco companies[1] have sued the Attorney General, claiming that the Massachusetts regulations are partially preempted by federal law, that the regulations violate their First Amendment right to free speech, and that the regulations violate the Commerce Clause of the Constitution. After due consideration of the arguments pressed by all parties and by amici curiae, and with full appreciation of the importance of the public health issue underlying this case, we conclude (1) that the regulations are not preempted by federal law, (2) that the regulations do not violate the First Amendment, and (3) that parts of the regulations unconstitutionally burden interstate commerce. Accordingly, we affirm in part and reverse in part the decision of the district court.

I. Factual and Procedural Background

On January 22, 1999, the Attorney General of Massachusetts promulgated regulations now codified at title 940, sections 21.00 through 21.07 (cigarettes and smokeless tobacco) and title 940, sections 22.00 through 22.09 (cigars) of the Massachusetts Code of Regulations. The regulations declare certain types of conduct by manufacturers, distributors, and sellers of tobacco products to be per se "unfair or deceptive acts or practices" prohibited under chapter 93A, § 2(a) of the Massachusetts General Laws. For example, the regulations prohibit a number of retail practices including promotional give-aways and mail ordering without age verification, see 940 C.M.R. §§ 21.04(1), 22.06(1), as well as measures aimed specifically at outlet sales practices, see id. §§ 21.04(2)-(3), 22.06(2)-(3). Of particular concern to the tobacco companies, the

[1] The appellants in these consolidated appeals include manufacturers of cigarettes, smokeless tobacco products, and cigars.

Massachusetts regulations also prohibit the following advertising practices:

> (a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
>
> (b) Point-of-sale advertising ... any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

*Id.* §§ 21.04(5), 22.06(5). A single exception to the advertising ban permitted the display of a so-called "tombstone" sign stating "Tobacco products sold here," *see id.* §§ 21.04(6), 22.06(6), but this provision was struck down by the district court on preemption grounds.[2] Finally, the regulations also prescribe mandatory warning statements to be included on all cigar labeling and advertising. *See id.* §§ 22.04, 22.05.

In response to the promulgation of the regulations, three separate suits were filed in federal district court by the appellants in this consolidated appeal, who are makers and sellers of cigarettes, smokeless tobacco products, and cigars. The cigarette and smokeless tobacco companies claimed that the Massachusetts regulations were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), codified as amended at 15 U.S.C. §§ 1331-41, and that the regulations violated their commercial speech rights under

---

[2] This aspect of the district court's decision has not been appealed and therefore is not before us.

the First Amendment.[3] The cigar companies also challenged the regulations on First Amendment grounds, as well as claiming that the regulations imposed an undue burden on interstate commerce in violation of the Commerce Clause. In an opinion issued December 2, 1999, the district court rejected the preemption arguments of the cigarette and smokeless tobacco producers. *See Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999) (*Lorillard I*). In a January 24, 2000 opinion, the district court likewise rejected the tobacco companies' First Amendment claims, as well as the cigar makers' Commerce Clause challenge. *See Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180 (D. Mass. 2000) (*Lorillard II*).[4] Judgment was entered on January 25, 2000 in favor of the Attorney General, and this appeal followed.

On appeal, the tobacco companies raise the following issues: (1) whether the Massachusetts regulations are preempted by federal law, (2) whether the regulations' advertising restrictions violate the First Amendment, (3) whether certain restrictions imposed on retail practices violate the First Amendment, (4) and whether the regulations' cigar warnings requirements violate the First Amendment and the Commerce Clause. The Attorney General cross-appeals one issue--whether the regulations'

---

[3] Although the FCLAA applies only to cigarettes, the smokeless tobacco companies join the cigarette makers' challenge because they contend that the regulations may not be severed to preserve the smokeless tobacco provisions if the cigarette provisions are declared invalid. We do not reach this aspect of the companies argument because we hold that the regulations are not preempted by the FCLAA.

[4] The district court did invalidate one aspect of the regulations under the First Amendment, finding that the Attorney General had failed to demonstrate that the point-of-sale provisions requiring indoor advertisements to be at least five feet from the floor were sufficiently tailored to serve the government's interests. *See Lorillard II*, 84 F. Supp. 2d at 192-93.

indoor advertising restrictions violate the First Amendment.

II. Law and Application

A. Preemption

1. Introduction

The Supreme Court has explained the analysis for determining when a state regulation is preempted by a federal law that contains specific preemption language. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-86, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), the Court stated that, to identify the domain expressly preempted by the federal statute, two presumptions about the nature of preemption must be considered. First, particularly when Congress has " 'legislated ... in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 485, 116 S. Ct. 2240. Second, in determining the scope of the federal preemption, the "ultimate touchstone" is Congress's purpose as "discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id.* at 486, 116 S. Ct. 2240. In this respect, it is relevant to consider the " 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.*

The tobacco companies argue, rather weakly we might say, that the "presumption against preemption" should not be applied in this case because the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, — U.S. —, —, 120 S. Ct. 1135, 1147, 146 L.

Ed. 2d 69 (2000). However, as the Court noted in Locke, the area at issue there--maritime commerce--is one in which "Congress has legislated from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.* at ----, 120 S. Ct. at 1148. We have little difficulty distinguishing the historically pervasive federal regulation of fields such as maritime commerce, *see, e.g., Kelly v. Washington*, 302 U.S. 1, 4, 58 S. Ct. 87, 82 L.Ed. 3 (1937) ("The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate. They were well described in the argument of the Assistant Solicitor General as a maze of regulation."), from Congress's relatively recent entry into the regulation of the tobacco industry. The thirty-five years that have passed since passage of the FCLAA, with its limited scope when compared to federal regulation of fields such as maritime commerce, can hardly serve as a basis for supplanting the traditional state authority in matters of public health, particularly that of minors. *See Medtronic*, 518 U.S. at 475, 116 S. Ct. 2240 ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, ... matters of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (citations omitted)). The "presumption against preemption" applies with full force to this case.

We turn, therefore, to our task of identifying "the domain expressly preempted" by § 1334(b), *id.* at 484, 116 S. Ct. 2240, keeping in mind (1) the presumption that Congress does not intend to supplant state regulation in the area of public health and the health of minors without a clear and manifest indication of such preemptory purpose, *see id.* at 485, 116 S. Ct. 2240, and (2) that our decision must "rest

primarily on a 'fair understanding of congressional purpose,' " as informed by the text, the statutory framework, and the purpose of the FCLAA as a whole, *id.* at 486, 116 S. Ct. 2240.

2. The Preemptive Scope of § 1334(b)

Section 1334(b) of the FCLAA states that "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). To date, four other federal courts of appeals have addressed the preemptive scope of this provision. *See Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9th Cir. 1999); *Greater New York Metro. Food Council v. Giuliani*, 195 F.3d 100 (2d Cir. 1999); *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999) ( "FAIR "); *Penn Advertising of Baltimore, Inc. v. Mayor & City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995). We find the Second and Seventh Circuits' decisions in Giuliani and FAIR to be particularly helpful.

In Giuliani, the United States Court of Appeals for the Second Circuit focused on the ambiguity in the phrase "with respect to" advertising and promotion. *See Giuliani*, 195 F.3d at 105. As the court noted, a "hyper- literal" reading of that phrase would preempt a range of state regulation which Congress surely did not intend to affect. *Id.* For example, "it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there. Or ... it could lead to the conclusion that 'states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard.'" *Id.* (citing *FAIR*, 189 F.3d at 633).

Given the ambiguity of the preemption provision, the Second Circuit endeavored to discern Congress's intent in enacting § 1334(b). Relying on the FCLAA's statement of purpose at 15 U.S.C. § 1331, the court reached two conclusions regarding the intended scope of § 1334(b): first, that Congress sought to inform the public of the health risks associated with smoking, and second, that while so informing the public Congress also sought to protect the national economy from the burdens that would result from a multitude of "'diverse, nonuniform, and confusing' advertising standards." *See Giuliani*, 195 F.3d at 106. The court logically concluded that § 1334(b)'s preemption provision was intended to further that congressional balance by preempting state regulations that would frustrate federal law by creating a "'multiplicity of conflicting regulations.'" *Id.*

Applying this reading of § 1334(b) to a 1000-foot rule essentially identical to that imposed by the Massachusetts regulations, the court found that the regulation was not preempted by the FCLAA because it "[did] not impose obligations 'with respect to' advertising as that phrase is used in § 1334(b)." *Id.* at 109. The court found that the 1000-foot restriction "do [es] not touch upon Congress's 'comprehensive Federal program' to control cigarette advertising information. The restrictions do not, for example, burden advertisers with a duty to warn. Nor do they impose content and format requirements on advertising information." *Id.* Although the court did recognize that different states and municipalities might impose differing regulations with regard to the location of tobacco advertising, "[d]ivergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them." *Id.*

Finally, the court in Giuliani also emphasized that "the presumption against preemption is particularly strong here, as these provisions are the sort thought to lie within the heartland of the states' historic powers." *Id.* (citing *Medtronic*, 518 U.S. at 485, 116 S. Ct. 2240). Both zoning regulations and regulations directed at the safety and welfare of minors, the court said, "lie peculiarly within the states' historic police powers." *Id.* (citing *Packer Corp. v. Utah*, 285 U.S. 105, 111, 52 S. Ct. 273, 76 L. Ed. 643 (1932) (zoning restrictions on cigarette advertising), and *Toy Mfrs. of America, Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d Cir. 1992)). Far from the clear and manifest intent required to preempt state regulation in such areas, the court noted that the legislative history of § 1334(b) suggests that Congress specifically intended to give such traditional state laws "wide berth." *Id.* at 110 (citing S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. at 2663). Based on the foregoing, the Second Circuit held that the 1000-foot restriction was not preempted by the FCLAA.

The United States Court of Appeals for the Seventh Circuit used a similar analysis to find that § 1334(b) did not preempt Chicago regulations restricting the advertising of cigarettes and alcoholic beverages. Relying largely on the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995), in which the court considered the similar preemption provision of the Employee Retirement Income Security Act (ERISA), the Seventh Circuit concluded that "[i]f the FCLAA language ('with respect to advertising and promotion') were viewed with an 'uncritical literalism,' the effect would be to 'read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.'"

*FAIR*, 189 F.3d at 637 (quoting *Travelers Ins.*, 514 U.S. at 656, 115 S. Ct. 1671).

As in Giuliani, the *FAIR* court then turned to an examination of the legislative history and overall scheme of the FCLAA and § 1334(b) to discern the intended scope of the preemption provision. *See id.* (relying on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), and *Medtronic*, 518 U.S. at 484-85, 116 S. Ct. 2240). After examining the statement of purpose found in § 1331 and the legislative history of § 1334(b), the court concluded:

> We therefore must read the language of the FCLAA preemption provision in light of Congress's desire not only to ensure uniformity of regulation with respect to matters of labeling and advertising, but also in light of the manifest congressional concern in preserving for the states the remainder of their traditional police powers.

*FAIR*, 189 F.3d at 638. Noting that the placement and manner of outdoor advertising is a matter of traditional local concern, the court declined to imply preemption of a regulation of such local interest and importance. Id. at 639. The court further concluded that the restrictions posed no danger of interfering with the FCLAA's advertising and labeling scheme, and held that they were not preempted by § 1334(b).[5]

We are persuaded by the reasoning of our sister circuits that Congress did not intend § 1334(b) to preempt the kind of tobacco advertising restrictions imposed by the Massachusetts regulations. The regulations do not interfere

---

[5] Both the FAIR and the Giuliani courts found that "tombstone" provisions similar to that invalidated by the district court were preempted by § 1334(b). *See FAIR*, 189 F.3d at 640; *Giuliani*, 195 F.3d at 108.

with the cigarette and smokeless tobacco labeling and advertising scheme established by Congress, and to the extent that they may create differing restrictions on the location of advertising in various states and municipalities, such divergent restrictions are indistinguishable from the existing zoning regulations in place throughout the country.[6] We do not consider such location restrictions to present the kind of "diverse, nonuniform, and confusing" advertising standards with which Congress was concerned when it enacted the FCLAA. *See Giuliani*, 195 F.3d at 106-07; *see also* 15 U.S.C. § 1331.[7] Thus, we hold that the Massachusetts regulations are not preempted by the FCLAA.

---

[6] The Fourth Circuit, in *Penn Advertising*, 63 F.3d at 1324, found that Baltimore's restrictions on outdoor cigarette advertisements were not preempted by § 1334(b). Although we do not adopt that court's apparent conclusion that location restrictions do not constitute a "'prohibition based on smoking and health,'" *id.*, we do agree with the general conclusion that Congress did not intend § 1334(b) to preempt restrictions of the kind at issue there and in this case.

[7] We also note that the Ninth Circuit, in *Lindsey*, 195 F.3d at 1073, concluded that a county ordinance banning all outdoor tobacco advertising was preempted by § 1334(b). That court determined that "[d]espite the holdings of Penn Advertising, FAIR, and Giuliani, the text of the FCLAA's preemption provision clearly preempts a ban on outdoor advertising because such a ban constitutes a 'requirement or prohibition based on smoking and health ... with respect to the advertising or promotion of any cigarettes.' " *Id.* (quoting 15 U.S.C. § 1331). With all due respect, we conclude that the court's analysis fails to avoid the "uncritical literalism" that the Supreme Court has cautioned us against, *Travelers Ins.*, 514 U.S. at 656, 115 S. Ct. 1671, and we disagree that "'[t]here is no good reason to believe that Congress meant less than what it said,'" *Lindsey*, 195 F.3d at 1073, in the phrase "with respect to advertising." We find the decisions of the Second and Seventh Circuits more in line with our reading of Congress's purpose, and more in line with our understanding of the Supreme Court's instructions in the area of federal preemption.

B. First Amendment Challenge to Advertising Restrictions

The next claim, urged by all three groups of tobacco companies, is that the advertising restrictions imposed by the Massachusetts regulations violate the companies' First Amendment right to freedom of speech. We find this contention unpersausive.

1. Level of Review

The tobacco companies first argue that the advertising and promotion restrictions at issue here should be subject to a more searching review than the "intermediate" scrutiny traditionally applied in commercial speech cases. *See generally Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561-66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). According to the companies, the regulations target tobacco advertising because of its content and therefore should be subject to a more demanding First Amendment analysis. The Attorney General, in contrast, characterizes the regulations as content-neutral and urges us to deferentially apply the Central Hudson test for commercial speech restrictions.

First, we repeat our conclusion (reached in the preemption analysis) that the regulations are content-based. The regulations apply only to advertising "the purpose or effect of which is to promote the use or sale of the [tobacco] product." 940 C.M.R. §§ 21.03, 22.03 (defining "advertisement"). Advertising of other products is not restricted by the regulations, nor is tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns. Contrary to the Attorney General's suggestion, this type of focus is plainly content-based.

Such conclusion does not, however, require a greater level of scrutiny than the standard Central Hudson analysis.

The tobacco companies argue that the regulations amount to inherently suspect "viewpoint discrimination" because they ban only speech that invites the purchase of tobacco products. However, the Supreme Court has made clear that even regulations which single out the promotional speech of a particular industry are analyzed under the Central Hudson test. *See Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 184, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999) (applying Central Hudson to regulations restricting advertisements for casino gambling).

The tobacco companies nevertheless argue that our decision in *AIDS Action Committee v. MBTA*, 42 F.3d 1, 11 (1st Cir. 1994), supports the application of a higher level of scrutiny. In that case, Boston's transportation authority refused to display public service advertisements for the AIDS Action Committee on the purported basis that the ads "describe[d] sexual content in a patently offensive way," *id.* at 5, but agreed to carry ads with similar or more explicit content by other speakers. We held that this disparity gave rise to an appearance that the suppression of speech was based on the identity or perceived viewpoint of the speaker, particularly because the transportation authority did not even attempt to articulate a neutral justification for the disparate treatment. *See id.* at 11. In contrast, the Attorney General here has not distinguished among speakers by disparately applying a facially neutral provision. On their face, the regulations restrict the promotion of tobacco products, regardless of brand or manufacturer, and permit nonpromotional speech relating to tobacco products by any speaker, tobacco manufacturers and sellers included. The companies make no allegation that the Attorney General has disparately, much less discriminatorily, applied these provisions. Under these circumstances, we do not see the danger of viewpoint discrimination that was present in AIDS Action

Committee,[8] and we decline to impose a higher level of review on such basis.

In declining to impose a more searching review than that mandated by Central Hudson, we are aware of the recent rumblings from members of the Supreme Court and others suggesting that the Central Hudson test may be in need of minor or major modification. *See, e.g., Greater New Orleans Broad. Ass'n*, 527 U.S. at 184, 119 S. Ct. 1923 ("[C]ertain judges, scholars, and amici curiae have advocated repudiation of the Central Hudson standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech."). Nevertheless, it is not our role to anticipate changes in well-established constitutional doctrines. *See Buzynski v. Oliver*, 538 F.2d 6, 7 (1st Cir. 1976) ("Although there are circumstances in which it is appropriate for a court of appeals to disregard the teachings of earlier Supreme Court decisions, generally the Supreme Court has the exclusive authority to overrule its decisions."

---

[8] Notwithstanding the tobacco companies' cries of mistreatment, the context in which the Massachusetts regulations were promulgated simply does not compare to that surrounding the suppression of speech in AIDS Action Committee. In that case, the suppression was directed at a group advocating sexual health practices, particularly with regard to AIDS--an issue that evokes deep feelings and often prejudices in our society. Furthermore, the suppression of speech in AIDS Action Committee, which was done with no contemporaneous explanation of reasons or basis, also came after a previous ad campaign had provoked public complaints which included a substantial display of homophobia. See AIDS Action Committee, 42 F.3d at 3. We found those particular circumstances to give rise to a presumption of viewpoint discrimination, but we did not suggest that ordinary commercial speech regulations, such as those at issue in this case, would give rise to a similar presumption absent comparable circumstances, which are simply not present here.

(citation omitted)). We are therefore bound to apply the Central Hudson test, as is, to this case.

2. The Central Hudson Test

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), the Supreme Court summarized the four-part analysis used to determine the constitutionality of governmental restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must [1] concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Under this analysis, the government bears the burden of identifying a substantial interest and justifying the challenged restriction. *See Greater New Orleans Broad. Ass'n*, 527 U.S. at 183, 119 S. Ct. 1923. Mindful that the four prongs of the analysis are "to a certain extent, interrelated," id., we will consider them seriatim.

a. Nonmisleading Speech Concerning Lawful Activity

Although the Attorney General is unwilling to entirely concede that the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity, he was willing to assume that much for the purposes of summary judgment. We therefore need not explore this prong of the analysis.

b. Substantial Interest

The second prong of the Central Hudson test requires that the state identify a substantial state interest underlying the challenged regulations. Several such interests have been identified by the Attorney General.

The first state interest proffered by the Attorney General is the Commonwealth's desire "to eliminate deception and unfairness in the way [tobacco products] are marketed, sold and distributed in Massachusetts." 940 C.M.R. §§ 21.01, 22.01. Leaving aside for now whether such interest is served by the regulations, we have no doubt that it is a substantial state interest. Indeed, the state interest in protecting consumers from false and misleading commercial information was the original justification for a more permissive First Amendment analysis in the commercial speech area. *See, e.g., Central Hudson*, 447 U.S. at 563-64, 100 S. Ct. 2343.

The next state interest identified by the Attorney General is the Commonwealth's aim "to address the incidence of [tobacco] use by children under legal age." 940 C.M.R. § 21.01; see also id. § 22.01. This general state interest is subdivided in the briefs into two distinct, but related, interests. First, the Attorney General asserts a state interest in ensuring compliance with state law, which prohibits the sale of tobacco products to minors, and we consider that interest substantial. Second, the Attorney General relies on the state's interest in protecting the health of children from the negative effects associated with the use and abuse of tobacco products, which is also substantial.

The tobacco companies argue that Massachusetts cannot have a substantial interest in depriving consumers of truthful information in a paternalistic effort to protect them by "keeping them in the dark." We certainly agree with this proposition insofar as it relates to adult consumers, in which

circumstance the First Amendment mandates that the consumer, rather than the government, judge the value of the information being communicated. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503-04, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). However, the courts have consistently recognized that the government may act more protectively where children are concerned. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) ("It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996) (citing cases in support of the proposition that "children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media"). Where, as here, the state acts to protect minors, its substantial interest is not vitiated by the admittedly paternalistic nature of its regulation.

c. Whether the Regulations "Directly Advance" the State's Interests

A great deal of the written and oral argument submitted in this case has concerned the third prong of our Central Hudson analysis--whether the Massachusetts regulations "directly advance" the Commonwealth's interests. After a careful review of the record, we hold that the regulations satisfy this prong of our inquiry.

The Supreme Court has recently emphasized that the government's burden regarding this third prong of the Central Hudson analysis

> "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its

> restriction will in fact alleviate them to a material degree." Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."

*Greater New Orleans Broad. Ass'n*, 527 U.S. at 188, 119 S. Ct. 1923 (quoting Edenfield v. Fane, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993), and Central Hudson, 447 U.S. at 564, 100 S. Ct. 2343). The companies and the Attorney General dispute both whether the harms recited by the Commonwealth are real and whether the regulations will alleviate them to a material degree. Although the two aspects of the inquiry are closely interrelated in this case, we address them separately for the sake of convenience and, hopefully, clarity.

i. Real Harms

Like so many contentious issues in the law, the dispute over whether the harms cited by the Attorney General are "real" is in part a dispute over the level of generality at which the inquiry itself should be made. The Attorney General, adopting a broader perspective, urges that the record and common sense amply support his contention that there is a problem with underage tobacco use, in the United States generally and in Massachusetts in particular. The Attorney General further asserts that this problem of underage tobacco use is substantially related to, and thus may be materially alleviated by restrictions upon, advertising. The tobacco companies, on the other hand, urge a more narrow perspective. They argue that the Attorney General has failed to demonstrate a teen cigarette smoking problem in Massachusetts, and that he certainly has shown no problem with underage consumption of smokeless tobacco or cigars. Furthermore, the companies charge, to the extent that there may be a problem with tobacco use by minors, the record does not establish any connection between such underage use and the types of

indoor and outdoor advertising and promotion restricted by the regulations. The Attorney General's principal response to the companies' emphasis on product-specific analysis, which response was accepted in large part by the district court, is that the three types of tobacco products subject to the regulations pose similar health concerns and similar dangers in the way they are promoted, and thus may and should be regulated pursuant to one common scheme.

First of all, we have some difficulty accepting the Attorney General's suggestion that "what is good for cigarettes is good for cigars," at least in the First Amendment context. To accept such a proposition could conceivably open the door to unforeseen and unjustified speech regulation on the mere theory that products are related or share ingredients. On the other hand, of course, the Attorney General need not offer separate justifications for regulation of green and red M & M's, to give an exaggerated example, and our commercial speech doctrine must allow the legislative and executive branches to make reasonable economies in their regulation of comparable products. However, we need not decide today whether, and under what circumstances, a "regulation by association" scheme might be acceptable in the commercial speech context, because we find that the Attorney General has offered sufficient product- specific evidence regarding cigarettes, smokeless tobacco, and cigars to demonstrate that the dangers posed by underage use of each is a "real harm" and that the regulations can be reasonably expected to alleviate those harms to a material degree.

Before addressing the product-specific information presented by the Attorney General, however, we do note that he is not the first to recognize that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco*

*Corp.*, --- U.S. ----, ----, 120 S. Ct. 1291, 1315, 146 L. Ed. 2d 121 (2000). After conducting the most extensive rulemaking procedure in history, the Food and Drug Administration promulgated regulations not unlike those issued by the Attorney General. *See* 61 Fed.Reg. 44619- 45318. Although the Supreme Court recently struck down the FDA regulations because it found that the agency did not have authority to regulate tobacco products, the Court explicitly emphasized "the seriousness of the problem that the FDA has sought to address" and stated that the agency had "amply demonstrated" its significance. *Brown & Williamson*, --- U.S. at ----, 120 S. Ct. at 1315. At this level of generality, we feel that the risk of harm posed by tobacco use, and particularly by underage tobacco use in this country, is established beyond reasonable dispute. Again, we need not decide whether this alone satisfies the "real harm" aspect of the "directly advances" prong, however, because the Attorney General has provided us with additional information to support his view that underage use of cigarettes, smokeless tobacco products, and cigars poses a real danger to the Commonwealth of Massachusetts.

i(A). Cigarettes

The Attorney General's case is strongest against cigarettes, which have become emblematic of the health risks associated with tobacco use in this country. In his summary judgment papers and in his submissions to this Court, the Attorney General refers at length to precisely the kinds of studies and summaries of statistical and anecdotal evidence accepted by the Supreme Court to justify commercial speech restrictions. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-28, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) ( "[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions

based solely on history, consensus, and 'simple common sense.'" (citations omitted)); Affidavit of Michael G. Hering and exhibits thereto, Joint Appendix at 1184-3087. These submissions are replete with evidence that smoking, particularly by minors, poses a significant risk to the public health and is a widespread practice. *See, e.g., U.S. Dep't of Health & Human Servs., Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994), Joint Appendix at 1203, 1223 ("Cigarette smoking during childhood and adolescence produces significant health problems among young people, including cough and phlegm production, an increased number and severity of respiratory illnesses, decreased physical fitness, and unfavorable lipid profile, and potential retardation in the rate of lung growth and the level of maximum lung function."); Massachusetts Dep't of Pub. Health, *Adolescent Tobacco Use in Massachusetts: Trends Among Public Schools Students 1984-1996* (1997), Joint Appendix at 2272, 2281. As such, they are more than sufficient to demonstrate that the harm cited by the Attorney General is a real one.

i(B). Smokeless Tobacco

The makers of smokeless tobacco products present two principal arguments for why, even assuming that Massachusetts could justify its regulation of cigarettes, the use of smokeless tobacco products does not present a comparable problem. First, the smokeless tobacco producers argue that the vast majority of the information relied upon by the Attorney General to justify the regulations concerns cigarettes specifically and not smokeless tobacco. Second, they point to studies indicating that, whatever national trends may exist, smokeless tobacco consumption by minors has actually decreased in Massachusetts during recent years. We address these arguments in turn.

The smokeless tobacco producers are correct that the Attorney General has been able to garner more information on the use and negative effects of cigarettes than of other tobacco products. However, the Attorney General does point to various sources specific to smokeless tobacco, including the relevant parts of the FDA regulations struck down but factually accepted by the Supreme Court in *Brown & Williamson*, as well as independent published studies. *See, e.g.*, Choi *et al.*, Does advertising promote smokeless tobacco use among adolescent boys? Evidence from California, Joint Appendix at 2516. Furthermore, the state's brief sets forth substantial anecdotal evidence detailing the highly successful marketing of smokeless tobacco to young consumers beginning in the late 1960s and early 1970s. Of course, the companies object that this data is dated and that it does not specifically evaluate the impact of outdoor advertising such as that principally targeted by the Massachusetts regulations, but we think that such objections demand more than Central Hudson requires. The Attorney General has adequately demonstrated that smokeless tobacco consumption by underage users poses a real danger.

The companies' second point is that the Massachusetts Department of Health study upon which the Attorney General largely relies actually shows a sharp decline in the use of smokeless tobacco by young people in Massachusetts between 1993 and 1996, in which time such use fell from 8.0 percent to 4.5 percent. *See* Mass. Dep't of Pub. Health, *Independent Evaluation of the Massachusetts Tobacco Control Program*, Joint Appendix at 3752. Although we understand the companies' frustration at increased regulation while current efforts seem to be bearing fruit, we do not think that partial successes in fighting underage smokeless tobacco use robs the Commonwealth of its authority to remedy what remains of the problem. Even

according to the study emphasized by the smokeless tobacco makers, a not-insignificant number of minors continues to use smokeless tobacco products in Massachusetts, and nothing submitted by the companies contradicts the Attorney General's evidence that this remaining use poses a significant health risk to those users, now and as they age. We therefore conclude that the Attorney General has satisfied this aspect of his burden with regard to smokeless tobacco products.

i(C). Cigars

The cigar makers largely echo the first argument pressed by the smokeless tobacco makers above--that the Attorney General impermissibly relies on studies and anecdotal evidence concerning cigarette smoking to justify regulation of cigars. Again, we find that the state has presented sufficient evidence to support its conclusion that underage cigar smoking constitutes a real harm.

The Attorney General relies heavily on a monograph published by the National Cancer Institute in 1998. *See* National Cancer Inst., Monograph 9, Cigars: Effects and Trends (1998), Joint Appendix at 2572. As that study sets forth in more detail, cigar smoking presents a serious risk of disease, comparable in type and severity to that attributed to cigarette smoking. *See id.* at 2588. The study also concludes that the "data on cigar use among adolescents is also alarming," referring specifically to Massachusetts for evidence of "a substantial level of cigar use, even prior to high school." *Id.* at 2598. We think that this evidence weighs very heavily in the Attorney General's favor.[9]

---

[9] The study also sheds light on the FDA's decision to not regulate cigars when it regulated cigarettes and smokeless tobacco in 1996, abstention much touted by the cigar companies in their briefs. According to the monologue, data on youth cigar usage was largely unavailable until recently. *See* Cigars: Effects and Trends, Joint Appendix at 2598.

The Attorney General also relies on anecdotal evidence of the successful advertising campaign waged by smokeless tobacco in the 1960s and 1970s (mentioned above) and a similar successful campaign by cigarette manufacturers in the 1940s and 1950s. He argues that these advertising campaigns have demonstrated a willingness and an effectiveness on the part of tobacco producers in the use of "image-related" advertisements to stimulate tobacco markets, and that minors are particularly susceptible to this type of advertising. The companies argue that this anecdotal evidence is dated and cannot establish a link between youth cigar smoking and advertising, particularly not the kind of advertising at issue here. Once again, we think that the standard urged by the tobacco companies demands more than is required by Central Hudson and its progeny. The Attorney General has sufficiently demonstrated that cigar use among minors poses a real danger in Massachusetts.

ii. Whether the Restrictions Will Alleviate the Cited Harms to a Material Degree

The second aspect of the third prong of the Central Hudson analysis is also hotly disputed by the parties. The tobacco companies argue that the Attorney General has failed entirely to demonstrate that advertising causes underage smoking or that advertising restrictions of the type at issue here will have any effect on underage tobacco use, much less result in a material reduction. The companies pointedly attack the studies submitted by the Attorney General and assert that several of those very studies decline to assert a cause-effect relationship between advertising and smoking. The Attorney General responds with a common sense argument on the causal relationship between advertising and product use, supported by a number of studies and anecdotal evidence demonstrating at least a

correlation between advertising and tobacco use in general and among children in particular. We think that the Attorney General has carried his burden.

The "common sense" argument asserted by the Attorney General--that advertising has some cause-effect relationship with consumption--is not a novel one. Indeed, the Supreme Court recognized in Central Hudson itself that "[t]here is an immediate connection between advertising and demand." 447 U.S. at 569, 100 S. Ct. 2343. More recently, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995), the Court found it "assuredly a matter of 'common sense' that a restriction on advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait." *But see Greater New Orleans Broad. Ass'n*, 527 U.S. at 189, 119 S. Ct. 1923 ("While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another."). After all, the five leading cigarette manufacturers spent approximately $5.66 billion on advertising and promotion in 1997, and nearly $300 million on outdoor advertising alone. *See* Federal Trade Comm'n, *Report to Congress for 1997*, Joint Appendix at 2544. It would defy common sense to conclude that for-profit corporations which have demonstrated their ability to survive and flourish in the market would pour such tremendous resources into advertising without at least some calculation that their efforts would have a substantial effect on consumption of their product. As a general proposition, we think that common sense does support the Attorney General's position.

[The Attorney General, however, does not rest on common sense arguments alone. He cites myriad sources to support his proposition that tobacco advertising and tobacco

use are causally related, including notably a Surgeon's General's report concluding that "cigarette advertising appears to increase young people's risk of smoking," *see* U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994), Joint Appendix at 1203, and the FDA's extensive investigation and finding that "advertising plays a material role in the decision by those under 18 to use tobacco products," *see* 60 Fed Reg. 44466 (1996), Joint Appendix at 1513. Nearly two thousand pages of the joint appendix in this case consist of reports and surveys by governmental, scientific, and academic entities submitted by the Attorney General in support of his dual proposition that tobacco use by minors poses a real risk and that tobacco advertising contributed materially to this problem.[10] Although we decline to summarize that material here, we have no difficulty concluding that it is sufficient to satisfy the Attorney General's burden of demonstrating that the restrictions will alleviate the harm caused by underage smoking to a material degree.

The smokeless tobacco and cigar manufacturers also repeat the argument that the majority of the materials submitted by the Attorney General concern primarily or exclusively cigarettes, and that such materials cannot justify restrictions on smokeless tobacco and cigar advertisements. We agree that the cigarette regulations are the supported most abundantly, in terms of the sheer size of record

---

[10] To be sure, the companies have presented studies in which no correlation or causal relationship was found between advertising and tobacco use. They also are critical of several of the studies cited by the Attorney General. However, the fact that there may exist differences of opinion on this issue is insufficient to deprive Massachusetts of its ability to enact regulations based on a well-founded conclusion that advertising restrictions will reduce tobacco use among young people.

submitted by the Attorney General. That, however, is not determinative. The product-specific information submitted by the Attorney General, taken in conjunction with the other statistical and anecdotal information presented, is sufficient to carry his burden. *See Florida Bar*, 515 U.S. at 626-28, 115 S. Ct. 2371.

Finally, the cigar manufacturers argue that the Massachusetts regulations cannot reasonably be expected to reduce cigar consumption in Massachusetts, because the advertising of cigars is nearly nonexistent in comparison with the pervasive promotion of cigarettes. For instance, the cigar makers do not use any billboards in Massachusetts, and they spent only $50,500 on outdoor advertising in the entire United States during 1997, compared to the nearly $300 million spent by the leading cigarette manufacturers in that year. While this argument is a forceful one, it fails to persuade us that the regulations are unjustified. Although the regulations will necessarily have a small impact on the amount of existing advertising (because relatively little exists), they will remove any outdoor advertising that does currently fall within 1000 feet of a school or playground, thus protecting those particular children. As the Attorney General has demonstrated, children exposed to tobacco advertising near their schools and play areas are likely to be affected by its message. Although fewer children will be affected by cigar advertising, simply because there is much less of it, the relative lack of current cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small. We cannot conclude that, under these particular circumstances, the First Amendment bars the Attorney General from regulating cigar advertising of the type targeted here, especially when we consider that he has done so as part of a rational and well-founded comprehensive tobacco regulatory scheme.

In sum, we conclude that the Attorney General has carried his burden of demonstrating that the regulations will "directly advance" his goals of reducing both underage tobacco use and tobacco sales to minors.[11] Less advertising may reasonably be expected to reduce the consumption of tobacco products by current users, insofar as there will be fewer reminders to stop at the store to pick up a pack of cigarettes, a can of smokeless tobacco, or a cigar (at least on the way to and from schools and playgrounds, where Massachusetts has focused its efforts). Moreover, the restrictions on advertising should reduce the number of new or future users by reducing the visibility of tobacco products to minors, by dispelling the advertising- encouraged notion that tobacco products are pervasive and form part of the "good life," and by eliminating the psychological incentives to tobacco use presented by things as simple as attractive ad color and design (aspects of advertising which we agree may reasonably be assumed to have greater effect on young people). Because the Attorney General has submitted sufficient data to demonstrate the harms posed by underage tobacco use and to support his view that the regulations will diminish underage tobacco consumption in both of these ways, we conclude that he has satisfied his burden under prong three of the Central Hudson analysis.

d. The Regulations Do Not Restrict More Speech than Necessary

The fourth and final prong of the Central Hudson analysis requires that the government not restrict more speech than necessary to achieve its purposes. In *Board of*

---

[11] We are not persuaded that the regulations further the state's interest in prohibiting the dispersion of false and misleading information to consumers. However, because the other interests identified by the Attorney General are directly advanced, this failure does not require invalidation of the regulations.

*Trustees of State University of New York v. Fox*, 492 U.S. 469, 477, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989), the Supreme Court explained that this is not a "least restrictive means" standard. Summarizing its holding, the Court stated:

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends"--a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served;" that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

*Id.* at 480, 109 S. Ct. 3028. We hold that the Massachusetts advertising regulations satisfy this requirement.

The companies' first argument that the Massachusetts regulations are not sufficiently tailored to satisfy the First Amendment is that, although the regulations facially apply only to areas within 1000 feet of a school or playground, the actual effect of the regulations is to prohibit virtually all advertising in as much as ninety percent of the land area of Massachusetts' three largest metropolitan areas, Boston, Worcester, and Springfield. Although this is certainly a valid point (even the Attorney General concedes that the reach of the regulations is substantial), it does not vitiate the tailoring of the speech restrictions in this case. While the amount of land within 1000 feet of a school or playground may be substantial, its sheer size cannot defeat the obvious connection to the state's interest in protecting minors, which is served directly by limiting application of the regulations to areas near schools and playgrounds--areas where children are more likely to be. We also find no indication that the Attorney General adopted the 1000-foot

rule as a proxy or pretext for a more general ban on tobacco advertising, in the Commonwealth's largest metropolitan areas or elsewhere in the state. Under the circumstances, we do not think that the substantial geographical reach of the regulations violates the First Amendment.

The companies also challenge the 1000-foot rule itself, arguing that it is both arbitrary and overly extensive. However, the Supreme Court in Fox explicitly noted "the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[d] the Legislative and Executive Branches needed leeway" in fashioning effective but proportionate commercial speech regulations. *See Fox*, 492 U.S. at 480, 109 S. Ct. 3028. The Attorney General based his 1000-foot determination primarily on the FDA's implementation of a comparable rule in its 1996 regulations, which, as noted, followed an extensive rulemaking procedure. Such reliance on the conclusions of a lengthy federal investigation should hardly be called arbitrary. Furthermore, it is worth noting that the industry has voluntarily refrained from billboard advertising within 500 feet of schools since 1990, which suggests that they recognize the value of such restrictions in principle. The contention that 500 feet is acceptable but that 1000 feet is somehow arbitrary strikes us as splitting hairs, particularly because this type of determination is generally better suited for legislative and executive decisionmakers than for the courts; in any event, it is a greater judicial second-guessing than is appropriate under the Central Hudson analysis for commercial speech restrictions. In the end, one thousand feet--a mere three city blocks--does not strike us as an unreasonable distance in which to assume that minors present at or on their way to or from schools and playgrounds would be most affected by outdoor advertising.

Whether or not it is a perfect "fit," it is a reasonable one, and that is what is required by Central Hudson and Fox.

Oddly enough, the district court struck down the 1000-foot boundary in the context of indoor advertising, concluding that the Attorney General had offered no basis for it other than the FDA regulations, which themselves did not restrict indoor ads. The Attorney General has appealed this aspect of the district court's decision, and we reverse, largely for reasons mentioned in the previous paragraph. It is hardly unreasonable for the Attorney General to determine that stores within 1000 feet of schools and playgrounds--that area where children are most likely to be present--will also be more likely to receive minors as customers. In fact, we do not doubt that the companies would have challenged the rationality of the Attorney General's regulatory scheme if it did not include restrictions on advertisements at the point of sale. We do have some misgivings about the effectiveness of a restriction that is based on the assumption that minors under five feet tall will not, or will less frequently, raise their view above eye-level, but we find that such determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment. In any event, the burden on speech imposed by the provision is very limited (there are no restrictions whatsoever on advertising above the five-foot level, so long as it is not visible from the street), and we find the compromise to be narrowly tailored and a reasonable "fit." *Fox*, 492 U.S. at 480, 109 S. Ct. 3028.

The tobacco companies' next argument is that the Attorney General may not regulate commercial speech when there exist several reasonable alternatives that would restrict no or less speech. In particular, the companies argue that Massachusetts should be required to more stringently enforce current laws prohibiting tobacco sales to minors, and perhaps make tobacco use itself illegal for

minors, before restricting tobacco advertising and promotion. We are not persuaded by this line of argument in this case. First, Massachusetts has not chosen speech restrictions as its first or only punch in its fight against underage tobacco use. To the contrary, the Commonwealth is widely considered a leader in many aspects of tobacco regulation. *See, e.g.*, Center for Disease Control, *Best Practices for Comprehensive Tobacco Control Programs* (Aug.1999), Joint Appendix at 684 (referring throughout to Massachusetts as a leader in tobacco control). Although the companies question this characterization, they offer no evidence to the contrary, nor do they offer any persuasive evidence that the state is neglecting to conscientiously and vigorously enforce its current laws. Second, in light of Fox, we do not think that Massachusetts should be required to criminalize underage tobacco use before it can regulate tobacco advertising around its schools and playgrounds. There are legitimate reasons why the state may not want to make underage tobacco use a crime; after all, the state's motivation is to protect children, not to institutionalize them. Third, the principal function of advertising is to propose a commercial transaction, in this case the sale of tobacco products--which, where minors are concerned, is already illegal in Massachusetts. And finally, while criminalization of underage tobacco use or possession (or stricter enforcement of existing laws, for that matter) might reduce the amount of current tobacco use, it is unlikely to serve the government's interest in reducing the demand for tobacco products among young people. The advertising regulations, in contrast, can reasonably be expected to reduce demand. For all of these reasons, we conclude that Massachusetts need not exhaust yet more alternatives in its ongoing efforts to curb underage tobacco use before restricting commercial speech in the targeted way that it does with the regulations.

The next area of dispute between the parties concerns the alternative modes of communication left open to tobacco manufacturers and retailers. The Attorney General emphasizes that the regulations do not restrict advertising and promotion in print media, such as newspapers and magazines. The tobacco companies, in response, note that tobacco advertising is already prohibited from television and radio.[12] They also point out that, while newspaper and magazine advertising may be a viable alternative for major manufacturers and some large retailers (as evidenced in part by the prevalence of cigarette and cigar ads in magazines), such media are cost-prohibitive for many vendors of tobacco products such as small groceries and convenience stores. These smaller vendors of tobacco products, the companies argue, are left without any reasonable alternative means for communicating with the public.

Although we find this argument quite a strong one, it does not require invalidation of the regulations because it does not vitiate the narrow tailoring of the restrictions on speech. After all, only businesses within 1000 feet of a school or playground--the area reasonably determined by the Attorney General to present the greatest exposure to minors--will be affected by the regulations. And even within those areas, the regulations as written explicitly permitted retailers to display so-called "tombstone" signs. *See* 940 C.M.R. § 21.04(6). These signs would have allowed retailers to communicate to legitimate consumers the availability of tobacco products, albeit less forcefully than larger, more colorful advertising. Unfortunately (for tobacco sellers), the district court found this aspect of the regulations preempted by the FCLAA, and the

---

[12] Congress prohibited such advertising of cigarettes and little cigars in 1971, see 15 U.S.C. § 1335, and of smokeless tobacco products in 1986, see 15 U.S.C. § 4402(f).

Commonwealth has not appealed that ruling. We nevertheless are of the view that this compromise established by the regulations, as written, is indicative of the kind of "calculation" by the Attorney General that the First Amendment requires of government when it seeks to restrict commercial speech. *See Fox*, 492 U.S. at 480, 109 S. Ct. 3028. And, although the striking of the tombstone exception measurably increases the burden on tobacco sellers (or rather removes an alleviating factor),[13] we cannot conclude that this vitiates the reasonable fit otherwise established by the regulations.

Finally, the tobacco companies suggest that the regulations are not sufficiently tailored because they deny communication to a large number of adults for the sake of protecting children. However, the cases referred to by the companies, such as *United States v. Playboy Entertainment Group, Inc.*, — U.S. —, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975), do not support their position. First, each of those cases dealt with expressive speech, rather than commercial speech, and therefore applied a "strict scrutiny" standard to invalidate the laws, rather than the intermediate scrutiny applicable to commercial speech cases. Furthermore, even in that context, the Court held that "the objective of sheltering children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy Entertainment Group*, — U.S. at — -

---

[13] We do not that, even under the district court's decision, which was premised on the content-based nature of the tombstone provision, the Commonwealth remains able to promulgate a new exception provision that does not dictate the content of a small information sign communicating to legitimate customers the availability of tobacco products, if the Commonwealth so desires.

—, 120 S. Ct. at 1886-87 (emphasis added); *see also Reno*, 521 U.S. at 874, 117 S. Ct. 2329 ("[The law's] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."). Here, although the geographical scope of the advertising restrictions is substantial, we do not find the restrictions equivalent to a "blanket ban" on speech. Furthermore, it is difficult to imagine how Massachusetts might effectively shield children from tobacco advertising near schools and playgrounds without incidentally burdening adult communication in that area as it does. The regulations themselves address this problem by providing an exception for indoor advertising in any establishment that excludes minors, *see* C.M.R. § 21.04(5)(b), as well by the very fact that the advertising restrictions are focused on areas where children are most likely to be present. Consequently, we think that the burden imposed on adult commercial communication within the 1000-foot perimeter is not so great as to render the regulations invalid under Central Hudson.

3. Conclusion

In conclusion, we hold that the advertising restrictions imposed by the Massachusetts regulations do not violate the First Amendment. The regulations directly advance the substantial interests identified by the Attorney General, and their restrictions on commercial speech are proportionate to the state's purposes. As the Supreme Court has stated, "[w]ithin those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480, 109 S. Ct. 3028.

C. First Amendment Challenge to Restrictions on Retail Practices

The manufacturers of smokeless tobacco and cigars also challenge the restrictions imposed by the Massachusetts regulations on the use of "self- service" displays as a retail outlet practice. See 940 C.M.R. § 22.06. The district court held that this practice is not protected by the First Amendment because it does not constitute speech. Although the issue is by no means an easy one, we agree and affirm.

On appeal, the tobacco companies argue that self-service displays are "a specialized mode of speech" that communicates information to the consumer and proposes a commercial transaction in much the same way as does advertising. Although we accept the tobacco companies' proposition that self-service displays often do have some communicative commercial function (covered as they often are in logos and other advertising mechanisms), the actual restriction imposed by the regulations is not on speech, but rather on the physical location of actual tobacco products. A familiar analogy illustrates this point. If sellers are so inclined, we see nothing in the regulations prohibiting them from displaying empty tobacco product containers in display cases, so long as no actual tobacco product is so displayed. In that circumstance, just like at the local video store, the consumer can peruse the relevant commercial information at his or her leisure before approaching the sales counter to make an actual purchase. For the vast majority of tobacco products, nearly all of which are distributed in sealed packaging which the consumer may not open and inspect before purchase, we think that this type of regulation poses no cognizable burden on speech, and any secondary imposition is surely so narrow as to be justified by the significant interests served by the regulations.

We do recognize that the sale of higher-end cigars poses a somewhat different circumstance. According to the cigar manufacturers, cigar retailers traditionally allow consumers pre-purchase access to cigars so that the consumer may make his or her selection on the basis of a number of objective and subjective factors including the aroma and feel of the cigar. Unlike the distribution of packaged cigars and little cigars, this specialized retail practice would in fact be burdened by prohibitions on self-service displays, and would implicate Central Hudson scrutiny if the First Amendment applies to such a retail practice.

However, we need not decide whether this particular form of self-service retail practice constitutes commercial speech protected by the First Amendment, because the regulations pass muster under Central Hudson even assuming arguendo that the commercial speech analysis applies. For the reasons set forth at length above, we conclude that the Attorney General has adequately demonstrated the substantial nature of the state's interests, as well as the general proposition that restrictions on advertising and promotion may reasonably be expected to directly advance those interests. It is apparent that limiting self-service displays and placing tobacco products behind the sales counter will aid in the Commonwealth's efforts to curb the sale of tobacco products to underage consumers and directly advance the state's goals. Finally, the regulations are more than sufficiently tailored to the goals of the regulation, not only because they leave open retail schemes such as those used by video stores, but also because the prohibition on self-service displays does not apply to "[s]elf-service displays that are located within adult-only retail facilities." 940 C.M.R. § 22.06(3)(c). A tobacco specialty store can therefore avoid any burden presented by the regulation by simply closing the store to children, who cannot lawfully purchase tobacco products in any event. We

find the fit between ends and means to be very reasonable, and we therefore conclude that the restrictions on self-service displays are constitutional.

D. Challenges to the Cigar Warnings Requirements

In addition to their challenges to the restrictions on advertising, promotion, and self-service displays, the cigar companies also challenge the warning scheme created by the Massachusetts regulations. Under that scheme, all packages and advertising of cigars must include a warning stating (1) that cigar smoke contains carbon monoxide and nicotine or (2) that cigars are not a safe alternative to cigarettes. *See* 940 C.M.R. §§ 22.04- 22.05. The warnings must occupy twenty-five percent of the front or top panel of the package (whichever is larger) and twenty percent of any advertisement, see id. §§ 22.04(2), 22.05(2), although that area may be used for any federal, state, or local warning so long as the Massachusetts warning remains clear and conspicuous, *see id.* § 22.04(2)(c). The use of a pre-printed sticker affixed to the package or advertisement constitutes compliance. *See id.* § 22.04(2)(b).

1. First Amendment Claim

The cigar companies' first argument posits that the warnings requirements violate the First Amendment. The district court rejected this argument, and we affirm for substantially the reasons set forth in the lower court's opinion. *See Lorillard II*, 84 F. Supp. 2d at 197-98.

At the outset, we note that warnings schemes similar to that imposed by the Massachusetts regulations have been repeatedly sustained by the courts. *See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-53, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985). Furthermore, the cigar warnings were specifically designed to "fill the gap" in federal law, which requires similar warnings for cigarettes and smokeless tobacco products but

not for cigars; this federal scheme has been in place since 1965 and its validity is well established.

As the Supreme Court made clear in Zauderer, there are "material differences between disclosure requirements and outright prohibitions on speech," 471 U.S. at 650, 105 S. Ct. 2265, such that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," *id.* at 651 n. 14, 105 S. Ct. 2265. Therefore, although the commercial speech analysis applies, the Supreme Court has held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651, 105 S. Ct. 2265.

On appeal, the cigar companies do not challenge the substantiality of the state's interest in informing consumers of the health risks associated with cigar smoking. Nor do they dispute that the regulations are reasonably related to that interest. Rather, the companies assert that the regulations are nevertheless unconstitutional because the very size of the required warnings (twenty-five percent of the main panel of packaging or twenty percent of advertising) "unduly burdens" speech. *Cf. id.* at 651, 105 S. Ct. 2265 ("We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.").

With respect to the packaging requirements, the companies argue that the warnings are unconstitutional because the Attorney General failed to prove that the Commonwealth's purposes could not be equally well served by warnings covering only, for example, ten percent of the front of top panel of the package. This argument, however, was explicitly rejected by the Supreme Court in Zauderer, where the Court declined to apply a "'least restrictive means' analysis" to disclosure requirements and stated:

"[W]e do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized." *Id.* at 651 n.14, 105 S. Ct. 2265. Because the packaging requirements are reasonably related to a substantial state interest and do not unduly burden interstate commerce, they are valid.

With regard to the advertisement warning requirements, the companies argue that the twenty-percent coverage of the warnings will so burden cigar manufacturers that they will cease advertising altogether. The companies offer precious little to support this difficult-to-believe proposition, and we find it unpersuasive. Other industries, including the manufacturers of cigarettes and smokeless tobacco products, have successfully incorporated warning schemes into their advertising practices, and cigars present no special considerations that lead us to believe a different result will ensue here. Similar to the restrictions upheld in Zauderer, Massachusetts "has not attempted to prevent [cigar makers] from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." *Id.* at 650, 105 S. Ct. 2265. As such, the advertising restrictions do not violate the First Amendment.

2. Commerce Clause Claim

Finally, the cigar companies claim that the cigar warning requirements imposed by the regulations unduly burden interstate commerce in violation of the Commerce Clause. We agree in part.

a. Advertising Requirements

Section 22.05 of the regulations makes it unlawful "for any persons to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the

advertising bears one of the warning statements ... and the warning statement ... comprises 20% of the area of the advertisement and is in the format required." As the district court, appellants, and the Attorney General all apparently agree, this language applies, on its face, to advertisements in national magazines sold in Massachusetts as well as to advertising on the Internet if viewed from an Internet terminal in Massachusetts. The district court, although recognizing the burden on interstate commerce that would result from a plain reading of the regulation, adopted a narrow interpretation under which § 22.05 did not apply to national magazines and Internet advertising, and upheld the regulation. While we agree with the district court's evaluation of the burden that would result from a facial application of the regulation, we think that the provision is not fairly susceptible to the narrowing construction, and we find that it unduly burdens interstate commerce.

The Supreme Court summarized the standard for evaluating nondiscriminatory state regulations on commerce in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970): "Where the statute regulates even- handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The warning requirements, as they apply to advertisements, satisfy the first inquiry of the Pike analysis uncontroversially: informing consumers of the health risks associated with cigar consumption is unquestionably a legitimate local public interest. However, even accepting the Attorney General's further position that any effect on interstate commerce is only incidental, the resulting burden on interstate commerce is clearly

excessive, even in relation to the Commonwealth's strong interest in informing consumers of health risks.

The plain language of the regulations, which makes it unlawful to "cause to be advertised" cigar products in Massachusetts, imposes liability on manufacturers for advertising in national magazines that are distributed in the Commonwealth, as well as for advertising on the Internet which can be viewed from a terminal in Massachusetts.[14] As the district court recognized, this "would place a great burden on interstate commerce since it would require the Massachusetts Warning to be carried by a national magazine in order to ensure that any copies ending up in Massachusetts carry the Warning." *Lorillard II*, 84 F. Supp. 2d at 203. The court also concluded that "the Commonwealth's local interest in capturing national magazines [and Internet media] is outweighed by the burden it would place on interstate commerce." Id. We agree with this evaluation of the burden imposed by the regulations, and we similarly conclude that in this respect § 22.05 runs afoul of the Pike analysis.

The district court, however, endeavored to save the regulations from invalidation by adopting a narrow interpretative gloss to avoid the constitutional problems posed by a facial reading. With little if any support in the language of the regulations, the court held that they would not apply to magazines of truly national distribution, unless the magazine had a regional or Massachusetts version, nor to Internet media. Id.

Although federal courts may in some circumstances adopt a "narrowing construction to which the law is fairly susceptible," *Rhode Island Assoc. of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 36 (1st Cir.1999), the courts must

---

[14] On their face, the regulations arguably impose liability on the print and Internet media, as well.

also take care not to trample the legislative or executive province of state authorities by making unduly substantive additions or changes to laws and regulations. As the companies point out, the district court's interpretative gloss may pose its own problems and ambiguities, such as the determination of whether a magazine is "truly national" in scope. We also are skeptical of the court's reasoning that Internet advertisements are not "within" Massachusetts; although we understand the court's point, and appreciate the difficulties inherent in regulation of speech in "cyberspace," the plain language of the regulations covers a person or entity that advertises on any Internet site viewable from a terminal in Massachusetts. Most important, there is simply no basis in the language or history of § 22.05 to support the narrow reading of the district court. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) (rejecting narrowing interpretation where, inter alia, "the ordinance by its plain terms is not susceptible to a narrowing construction"). In sum, although there can be no easily and brightly demarcated line between proper narrowing construction and judicial overreaching, we conclude that the regulations are simply not "fairly susceptible" to the district court's narrowing interpretation. *Rhode Island Assoc. of Realtors*, 199 F.3d at 36.

We therefore hold that the warnings requirements for advertising are unconstitutional. Although appropriate intrastate application of these or similar restrictions may be permissible, § 22.05 does not lend itself to judicial parsing, and we leave it to the Attorney General, if he so wishes, to craft a constitutional warnings requirement for media and other cigar advertising.

b. Packaging Requirements

The cigar companies also challenge the provision making it unlawful to "manufacture, package, import for sale or

distribute within Massachusetts any manufactured cigar or manufactured little cigar the package of which does not bear" the required warning. 940 C.M.R. § 22.04(1). As all parties seem to agree, this language imposes liability on a manufacturer whenever one of its cigars appears in Massachusetts without the required warning, even when the sale is conducted by third parties without the knowledge or consent of the manufacturer. We think that this provision burdens interstate commerce in an impermissible manner.

As an initial matter, we would note that we do not find Pike problems with the Attorney General's labeling scheme in general. Similar warnings are required on a range of products by a number of states, *see, e.g.*, California Health & Safety Code § 104550 (cigar labels and warnings); Ala. Code § 8-19- 5(23) (making it unlawful to affix a required revenue stamp to improperly labeled cigarette packages); New York Alcoholic Beverage Control Law § 107- a (authorizing and governing state labeling scheme for alcoholic beverages), and the burden on manufacturers and retailers of requiring state-specific packaging, while significant, does not generally outweigh the benefits of informing the public of serious health issues. We generally agree with the Attorney General that the companies' interest in the efficiency of a uniform national labeling system cannot override the Commonwealth's substantial interest in protecting its citizens. Although it might not be ideal for the companies to have to coordinate all Massachusetts distribution through a central point to affix labels, this option certainly would give the manufacturers adequate room within which to maneuver, without imposing any undue burden on interstate commerce.

However, there is one aspect of the regulations that renders them unduly burdensome, and that is § 22.05's imposition of liability for third party action. As mentioned

above, the regulations impose liability on the manufacturers for every import, sale, or distribution of an improperly labeled package in Massachusetts, even when the sale or distribution is made by a third party unconnected with the manufacturer, such as a mail-order seller in another state or any other distributer, wholesaler, or retail seller that sells cigars to Massachusetts consumers independent of the manufacturer. Under this scheme, the manufacturers may not safely label only those packages intended for Massachusetts; instead, to protect themselves against liability for conduct totally without their control, the manufacturers have no choice but to include the Massachusetts warnings on all packages, just in case one should later appear in Massachusetts through unforeseen channels. This harsh practical effect of the regulations stands in sharp contrast to all other warnings schemes of which the Court is aware, which typically impose liability on the ultimate seller, thus containing the law's effect intrastate and also allowing all affected parties to take the necessary precautions to comply with the law and avoid substantial liability. In this respect, we conclude that the benefit derived from the regulations is clearly outweighed by the substantial burdens placed on interstate commerce.

Unlike the advertising requirements, the labeling provisions are not easily susceptible to parsing of what is constitutional and what runs afoul of the Commerce Clause. Therefore, although we would find many aspects of the package labeling provisions to pass constitutional muster, we must invalidate them in their entirety and leave it to the Attorney General to reformulate them, if he so desires, in a manner consistent with this decision and the Constitution. We therefore hold 940 C.M.R. § 22.04 to be unconstitutional and without effect, except insofar as it provides the warnings and format specifications required in 940 C.M.R. § 22.05.

## III. Conclusion

For the reasons set forth above, we hold that the Massachusetts regulations are not preempted by federal law, do not violate the First Amendment, and do not violate the Commerce Clause except for 940 C.M.R. § 22.04 and § 22.05. The judgment of the district court is

Affirmed in part, reversed in part.

## APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO CO., R.J. REYNOLDS TOBACCO CO., PHILIP MORRIS INC., BROWN & WILLIAMSON TOBACCO CORP., AND UNITED STATES TOBACCO CO., PLAINTIFFS,

V.

THOMAS REILLY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MASSACHUSETTS, DEFENDANT.

CONSOLIDATED CIGAR CORP.; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC; SWEDISH MATCH NORTH AMERICA, INC; SWISHER INTERNATIONAL, INC.; AND TOBACCO EXPORTERS INTERNATIONAL (USA) LTD., PLAINTIFFS,

V.

THOMAS REILLY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MASSACHUSETTS, DEFENDANT.

NOS. CIV.A.99-11118WGY, CIV.A.99-11270WGY.

JAN. 24, 2000.

James V. Kearney, Christopher R. Harris, Latham & Watkins, New York City, Peter C. Netburn, Peter G. Hermes, Hermes, Netburn, O'Connor & Spearing, Boston, MA, for Consolidated Cigar Corporation, General cigar Co., Inc., Havatampa, Inc., John Middleton, Inc., L.J. Peretti Co., Inc., Swedish Match North America, Inc., Swisher Intern., Inc., plaintiffs.

George J. Skelly, Skadden, Arps, Slate, Meagher & Flom LLP, Boston, MA, for United States Tobacco Company, plaintiff.

Thomas F. Reilly, Attorney General's Office, William T. Matlack, William W. Porter, Michael G. Hering, Assistant Attorney General, Office of the Attorney General, Boston, MA, for Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts, defendant.

Robert B. Collings, United States District Court, Boston, MA, for ADR Provider, pro se.

MEMORANDUM AND ORDER

YOUNG, Chief Judge.

## I. CIGARETTE ADVERTISING IS FUNCTIONAL PORNOGRAPHY

The metaphor is apt. Both are entirely legal. Both are spawned by and supported by multi-billion-dollar industries generating significant economic activity. While ostensibly clucking in disapproval, millions of adult Americans support each industry with considerable cash outlays yet seek to have the government teach our children to avoid that which so many of us eagerly purchase.

Both cigarette advertising and pornography are protected forms of speech, reaching out to offer messages or products desired by and legal for adults. At the same time we leave it to our government to seek to shield our children from both of these forms of speech, believing them to be either inherently corrupting (pornography) or an inducement (cigarette advertising) to engage in an activity unlawful for minors. This dichotomy in the way we try to administer our visual world--a dichotomy in which adults value certain forms of speech but at the same time wish to eliminate vulnerable children from the audience--lies at the center of this case.

## II. PROCEDURAL POSTURE

Responding to concerns about the use of tobacco products by minors, the Attorney General of the Commonwealth of Massachusetts promulgated regulations on January 22, 1999 (the "Regulations") that render certain types of tobacco product advertising and promotion "unfair or deceptive acts or practices" under Mass. Gen. Laws ch. 93A, § 2(a). *See* Mass. Gen. Laws ch. 93A, § 2(c) (1999). The Regulations, which become effective on February 1, 2000, essentially prohibit advertisements visible from areas likely to be frequented by minors. A companion set of regulations places the cigar industry under advertising restrictions and label warning requirements for the very first time. *See* Mass. Regs. Code tit. 940, §§ 22.00-22.09, as amended Jan. 19, 2000. Several cigarette and smokeless tobacco product manufacturers, namely Lorillard Tobacco Company, R.J. Reynolds Tobacco Company, Philip Morris Incorporated, Brown & Williamson Tobacco Corporation and United States Tobacco Company (collectively, the "Tobacco Companies"), seek a declaration that the Regulations are unconstitutional under the First Amendment. Several cigar manufacturers, namely Consolidated Cigar Corporation, General Cigar Company, Havatampa, John Middleton, L.J. Peretti Company, Swedish Match North America, Swisher International, and Tobacco Exporters International (USA) (collectively, the "Cigar Companies") join the Tobacco Companies in challenging the Regulations under the First Amendment and also bring a challenge on the basis of the Commerce Clause of the Constitution. The Commonwealth of Massachusetts, through its Attorney General Thomas F. Reilly (the "Attorney General"), also moves for summary judgment. Since there are no material facts in dispute concerning these issues, and the parties have filed cross-motions for summary judgment, a declaration as

matter of law concerning the validity of the Regulations is in order.[1]

## III. THE REGULATIONS

Encompassed by the legal challenges brought by the Tobacco Companies are regulations promulgated by the Attorney General under the title "Sales and Distribution of Cigarettes and Smokeless Tobacco Products in Massachusetts," (the "Tobacco Regulations"). 940 C.M.R. §§ 21.00-27.07. The Cigar Companies challenge the similar Regulations promulgated under the title "Sales and Distribution of Cigars in Massachusetts" (the "Cigar Regulations") 940 C.M.R. §§ 22.00-22.09.

## IV. TOBACCO REGULATIONS--FIRST AMENDMENT CHALLENGES

### A. The Tobacco Regulations

Neither the Tobacco Companies nor the Attorney General, for purposes of this motion, disputes the underlying goals of the Regulations in trying to curb underage smoking. The stated purposes of these regulations are to eliminate deception and unfairness in the way tobacco products are marketed and sold, in order to address the incidence of tobacco use by underage children. *See* 940 C.M.R. § 21.01. The pertinent portions of the

---

[1] This Court previously has held, by order of December 2, 1999, *see Lorillard v. Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999), that 940 C.M.R. § 21.04(6), the portion of the Regulation prescribing "tombstone advertising," is preempted by federal law. This Court did not address the corresponding Cigar Regulation, 940 C.M.R. § 22.06(6). As cigar advertising is not regulated by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1342, and the Cigar Companies have not, in any case, brought a motion based on preemption of 940 C.M.R. § 22.06(6), the "tombstone advertising" provision for cigars therein stands, subject to the resolution of the motions herein.

regulations render the following advertising practices an "unfair or deceptive act or practice":

> (a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
>
> (b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

940 C.M.R. § 21.04(5)

The Cigar Regulations contain an identical provision, respecting "cigars" and "little cigars," to which the same First Amendment analysis applies.[2] See 940 C.M.R. § 22.06(5).

B. First Amendment Issues

1. The Standard of Review

Despite the arguable lack of political or socially-useful content apart from product information, commercial speech has received First Amendment protection since the decision of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). Challenges to advertising regulations are typically analyzed under the framework established in

---

[2] The Cigar Companies argue that their products deserve a different First Amendments analysis. The Court addresses this argument infra, section V.B.

*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). That framework involves a four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Central Hudson*, 447 U.S. at 566, 100 S. Ct. 2343.

As a preliminary matter, the Tobacco Companies argue that a standard of review higher than that contained in Central Hudson should apply. *See* Pls.' Opp'n at 3. They argue that tobacco advertising that provides sale or brand information is not misleading or deceptive, does not incite children to smoke, and is already required to carry health warnings by operation of federal law. *See id.* In particular, the Tobacco Companies argue that their situation is analogous to that of the contraceptive advertiser in the case of *Carey v. Population Servs. Int'l*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977), in which the Supreme Court held unconstitutional a New York state prohibition on any advertisement or display of contraceptives.

Notwithstanding the fact that the Tobacco Companies are advertising a legal commercial product, their analogy to Carey is misplaced. Their closest companions are pornographers, not those offering reproductive services. Carey recognized that "where a decision as fundamental as that whether to bear or beget a child is involved, regulations

imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Id.* at 686, 97 S. Ct. 2010. Smoking, like pornography, a type of legal recreational consumption enjoyed by millions of adults, has no readily discernable social or health benefits remotely comparable to contraception. Although smoking and pornography are arguably an important part of certain social circles, the "right" to smoke cannot be said to implicate constitutional rights as fundamental as does the "right" to determine reproductive decisions. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (recognizing the constitutional right to be free from unwarranted governmental intrusion into the decision whether to bear or beget a child). The right protected in the instant case is the right to free speech relating to generic commercial products. Carey thus suggests that a court look to the social benefits of the advertised product when designating a standard of review for commercial speech restrictions. This additional check protects socially- or politically-important products from being unconstitutionally regulated through the back-door of advertising restrictions.

Some forms of advertising are particularly susceptible to constitutional concerns. With respect to the advertising restrictions in Carey, the Supreme Court recognized that their "can be no contention that the regulation is 'a mere time, place, and manner restriction.'" *Carey*, 431 U.S. at 700, 97 S. Ct. 2010. Unlike the instant Tobacco Regulations, the regulations in Carey were "total suppression" of all advertising, and concerned "activity with which, at least in some respects, the State could not interfere." *Id.* (quoting Virginia Pharmacy Bd., 425 U.S. at 760, 96 S. Ct. 1817). The Supreme Court thus recognized that advertising regulations directed toward a product whose actual availability itself implicates constitutional protections may be subject to high

scrutiny, especially when those advertising regulations are "total suppression." In consequence, the State cannot easily, by regulating advertising, skirt the constitutional protections implicit in the product itself by imposing a ban on advertising and, in subsequent litigation, label those restrictions as merely regulation of "commercial speech." The underlying double set of implicated rights could, in certain circumstances, trigger the heightened scrutiny sought by the Tobacco Companies, but the case at bar does not sufficiently resemble Carey to warrant that standard. The Tobacco Regulations concern place and manner. They regulate a product whose principal use, like pornography, is recreational.

Consistent with his obligation to the Constitution, the Attorney General has presented, as will be discussed infra, valid justifications to regulate tobacco advertising. In Carey, the Supreme Court dismissed any notions that a ban on contraceptive advertising was justified by the State's contention that advertisements would be "offensive and embarrassing" or that they would "legitimize sexual activity of young people." With regard to the latter point, it is true that the Supreme Court ruled that none of the advertisements could "even remotely be characterized as 'directed to inciting or producing imminent lawless action and ... likely to incite or produce such action.' " *Id.* at 701, 97 S. Ct. 2010, (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 [1969] ). The Tobacco Companies claim a similar lack of incitement in their advertising.

Hoping to draw a parallel to the advertisers in Carey, the Tobacco Companies argue that their advertisements "merely state the availability of products and services that are not only entirely legal [citation omitted], but constitutionally protected." *Id.* The last phrase of this passage from Carey is the key: the underlying activity in

Carey had particular Constitutional protection. The Supreme Court's earlier citation to *Brandenburg v. Ohio* supports this emphasis. In Brandenburg, the underlying activity concerned the right to assemble with others in order to advocate action. *See Brandenburg*, 395 U.S. at 449, 89 S. Ct. 1827. The state law in Brandenburg criminalized certain instances of that behavior even in the absence of direct incitement, a law which obviously impacted on fundamental social and political freedoms. Smoking presents no such underlying constitutional concerns. Tobacco products are general, recreational, articles of commerce that are regulated and that may be regulated in many ways. The right to smoke exists only insofar as governments have allowed the products to be sold. The fact that cigarettes and other tobacco products are currently legal for adults does give rise to certain First Amendment constitutional rights to advertise those products, but those rights are completely delineated within the Central Hudson commercial speech framework. There is no compelling reason to apply a heightened standard.

2. First Amendment Analysis Under the Central Hudson Framework

Ultimately, in order for the Tobacco Regulations to be upheld against a First Amendment challenge, the Regulations must satisfy the four-part test expressed in Central Hudson. The first step of that analysis requires that the targeted speech qualify for constitutional protection. *See Central Hudson*, 447 U.S. at 566.

Legitimate commercial speech is entitled to constitutional protections, but commercial speech that incites illegal activity may not be protected. The Attorney General does not concede that the targeted advertising qualifies for protection, since it might be seen to induce illegal activity. He is content to pass on that issue now, however, and to ask this Court to determine whether the

regulations may stand, under the assumption that the advertising is, indeed, qualified for protection. *See* Def.'s Mem. in Supp. at 5-6. Thus there are three remaining Central Hudson factors.

a. Governmental Interest

Massachusetts, through various legislative and regulatory initiatives, has expressed an interest in reducing the number of underage smokers. The Attorney General argues that this governmental interest in addressing the incidence of underage tobacco use is substantial enough to meet the second part of the Central Hudson test. The Fourth Circuit in *Penn Advert. of Baltimore v. Mayor and City Council of Baltimore*[3], found that promoting compliance with the state prohibition of the sale of cigarettes to minors was a substantial governmental interest under Central Hudson.

Attempting to support the contrary conclusion, the Tobacco Companies point to *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). In 44 Liquormart, the Supreme Court found that a state ban on liquor price advertising was unconstitutional. That case does not inform this Court's analysis, however, because it concerned the imposition of a "vice" characterization of alcohol with respect to adult consumers. *See id.* at 513-14, 116 S. Ct. 1495. The Attorney General's intention here is to target the prevalence of an illegal activity--underage smoking--not to restrict information from reaching adult smokers or to place a "vice" label on smoking.[4]

---

[3] 63 F.3d 1318, 1326 (4th Cir. 1995), vacated 518 U.S. 1030, 116 S. Ct. 2575, 135 L. Ed. 2d 1090 (1996), modified, 101 F.3d 332 (4th Cir. 1996), cert. denied, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 715 (1997).

[4] 44 Liquormart is further distinguishable in that it involved a complete statutory ban on price advertising, a characteristic that appears to have concerned the Supreme

This Court agrees with the Fourth Circuit that a state has a substantial interest in promoting compliance with one of its own valid laws.[5] The Commonwealth's interest in this case is substantial enough to meet the second prong of the Central Hudson test.

b. Directly Advancing the Government Interest

No governmental interest, however strong, can justify legislation that "misses the mark." The third prong of the Central Hudson test requires a showing that the challenged regulation directly advances the governmental interest asserted. *See Central Hudson*, 447 U.S. at 566, 100 S. Ct. 2343. This requirement may be satisfied by the submission of surveys, studies, and even anecdotal evidence. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 627-29, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995). In certain cases, even "history, consensus, and 'simple common sense' " can be used to support the finding that the regulation advances the

---

Court greatly. *See id.* at 502, 504, 116 S. Ct. 1495. That point goes to the tailoring of the law, however, and not the initial question of governmental interest. The Supreme Court appears to have had no trouble in recognizing a state interest in reducing alcohol consumption, the stated purpose of the statute.

[5] This interest is particularly high where the goal is to protect children who may not be able to assess the nature of the messages contained in the advertising. *See Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996), vacated, 517 U.S. 1206, 116 S. Ct. 1821, 134 L. Ed. 2d 927 (for reconsideration in light of *44 Liquormart*), on remand, 101 F.3d 325 (1996) (reaffirming original ruling), cert. denied, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 714. Indeed, this is an area where tobacco advertising and pornography bear a striking similarity, as governments try to shield children from adult-targeted expression. *Cf. Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (upholding law prohibiting sale of obscene materials to minors).

governmental interest. Id. at 628, 115 S. Ct. 2371 (quoting *Burson v. Freeman*, 504 U.S. 191, 211, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) ).

The Attorney General cites cases finding a common-sense connection between promotional advertising and consumption. *See* Def.'s Mem. in Supp. at 8. He also cites reports of the Surgeon General, the Food and Drug Administration, and the National Academy of Sciences' Institute of Medicine specifically linking advertising exposure to underage smoking, see id. at 9, and relies upon many government, scientific, empirical, and academic reports that support the use of advertising restrictions to decrease youth smoking. *See id.* at 10-12. These submissions are more than sufficient under the Central Hudson analysis. "[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by references to studies and anecdotes pertaining to different locales altogether." *Florida Bar*, 515 U.S. at 628, 115 S. Ct. 2371.

In Penn Advertising, the Fourth Circuit analyzed regulations similar to the ones here and ruled that there was a "logical nexus" between advertising restrictions and the interest in reducing underage smoking. 63 F.3d at 1326. The Tobacco Companies argue that they advertise to influence consumers' brand preference and to persuade consumers to change brands.[6] Common sense informs this

---

[6] If true, the Tobacco Regulations ought not harm the industry as a whole, because all competitors will be equally restricted from certain forms of advertising. If the economic impact to the industry as a whole is negligible because advertising affects solely brand preference (and not total consumption), it begs the question why the tobacco industry would pursue costly litigation which only preserves for them the ability to woo customers from each other.

Court, however, that tobacco advertising must play some logical role, even if not a primary one, in the total amount of smoking. By way of comparison, it is not unusual to see advertisements for products or services even though the advertiser has a de facto monopoly. For example, the familiar advertisements by DeBeers encouraging the purchase of diamonds can hardly be construed as intended to convince customers to change brands, because there are essentially no competing brands. See Anthony DePalma, Diamonds in the Cold; New Canadian Mine Seeks Its Place in a DeBeers World, N.Y. Times, Apr. 13, 1999, at C1 (noting the diamond "cartel's tight grip on the market"). Rather, the advertisements remind consumers of the represented benefits of the product and encourage further purchases.[7] Studies, including those presented by the Attorney General, reach the same conclusion with more scientific precision. "[R]esearch has confirmed that 'tobacco advertising plays an important role in encouraging young people to [smoke].'" Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420, 1508 (1999) (quoting John P. Pierce, Lora Lee & Elizabeth A. Gilpin, Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association with Targeted Advertising, 271 JAMA 608, 611 [1994] ).

The Tobacco Companies challenge the sufficiency of the Attorney General's showing in several ways. They first argue that the studies upon which he relies were not submitted with sworn expert affidavits, are therefore inadmissible, and cannot support the Central Hudson analysis. *See* Pls.' Opp'n at 6. This evidentiary point is weak.

---

[7] This is particularly true of point-of-sale advertising, where consumers may be reminded to purchase an extra pack of cigarettes even if their original trip to the store was only for milk.

The government reports are admissible as government documents. *See* Fed. R. Evid. 803(8)(c); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988). As to the other reports, the Central Hudson inquiry centers on whether the government had a logical belief, when it crafted the regulation, that its regulation would directly advance its purpose.[8] *See Penn Advertising*, 63 F.3d at 1323. The government need not limit its legislative acts to those based only on evidence which would later be admissible at any potential trial. The existence of the studies demonstrates, from the point of view of the Commonwealth while legislating or regulating, a sufficient connection between advertising and youth smoking.

The Tobacco Companies next argue that the Attorney General has relied too much on common sense and reason to satisfy the third prong of Central Hudson. *See* Pls.' Opp'n at 7-8. They argue that brand advertising has the effect of reallocating demand among competing suppliers, and does not increase aggregate demand. They assert that the Attorney General's speculation that a restriction on advertising will lower primary demand is insufficient. The Attorney General has indicated, however, that the Regulations also promote the purpose of reducing the number of current underage smokers by lowering their exposure to advertisements. Thus a determination of whether primary demand, per se, is affected is not required, although it has been addressed supra.

Several studies, and common sense, show a link between advertising and smoking. The Regulations attempt to restrict advertising in and around the places most traveled

---

[8] In this sense, Central Hudson seems to remove such reports from classification as hearsay at all, since the reports are not submitted for the truth of their statements, but rather as evidence of the effect of those statements on the legislating body.

by children. The Attorney General has thus shown, through both studies and common sense, that the Regulations will have a direct effect on underage smoking.

The remainder of the Tobacco Companies' attack on this prong consists of a challenge to the accuracy or conclusions of the studies themselves. *See* Pls.' Opp'n at 8. They assert that there is no evidence that advertising is the sole cause of underage smoking, and point out that many other factors influence a teenager to smoke. They cite weaknesses in the Attorney General's studies for the proposition that there is no conclusive proof that tobacco advertising causes people to smoke. Using these doubts as evidence of a lack of connection between advertising and smoking, the Tobacco Companies point out that in Florida Bar, the opponents to the regulation presented no data or evidence to contradict that presented by the government. Furthermore, they argue, a court is not free to speculate or choose among competing experts or to defer to the legislature in the absence of an adequate factual record. *See* Pls.' Opp'n at 11. Here, however, unlike the 44 Liquormart case to which Tobacco Companies cite, there is a solid body of research demonstrating a link between advertising and incidence of smoking. The Attorney General has reacted to that evidence in addressing the problem of underage smoking by targeting forms of advertising which are in proximity to children. The question that emerges is what level of evidence the Commonwealth would need in order to legitimate, under the Constitution, its legislative or regulatory decisions.

The government is not required to satisfy the causal relationship by a preponderance of the evidence. "The inquiry under Central Hudson 's third prong--whether the regulation directly advances the stated interest--does not involve as strict a nexus as that inherent in the traditional tort concept of causation. Rather, the inquiry seeks to elicit

whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." *Anheuser-Busch*, 63 F.3d at 1313.

If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met. [Citation omitted] The determinative question in reviewing a facial challenge to an ordinance thus is whether the legislative body acted with the objectively reasonable belief that the means it selected fit the objective sought. The issue is not whether the substantive findings on which it relied are incontrovertibly true.

*Penn Advertising*, 63 F.3d at 1323.

This case is unlike those in which the government has failed to satisfy the third Central Hudson prong by failure to submit any credible evidence of direct advancement. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) (government "did not offer any convincing evidence"); *Edenfield v. Fane*, 507 U.S. 761, 770-1, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (not satisfied if based on "mere speculation or conjecture"). The Attorney General has provided substantial evidence showing that regulation of tobacco advertising would substantially advance its interest in curtailing underage smoking. This relationship satisfies the third prong of Central Hudson.

c. Not More Extensive Than is Necessary to Serve the Government Interest

The final part of the Central Hudson analysis requires the court to examine whether the challenged Regulations restrict speech in a manner that is more extensive than necessary to serve the governmental interest. *See Central*

*Hudson*, 447 U.S. at 566, 100 S. Ct. 2343. The fit need not be perfect, but it should be reasonable, something "short of a least-restrictive- means standard." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). The Supreme Court has adopted, derived from "time-place-manner" restriction doctrine, a "narrow tailoring" standard in which the regulation should not burden substantially more speech than is necessary to further the government's legitimate interests. *Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173, 119 S. Ct. 1923, 1932, 144 L. Ed. 2d 161 (1999). This means "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* (quoting *Fox*, 492 U.S. at 480, 109 S. Ct. 3028). The Supreme Court is "loath to second-guess the Government's judgment to that effect." *Fox*, 492 U.S. at 478, 109 S. Ct. 3028.

The Attorney General argues that the Regulations are discrete and targeted because they apply only within 1000 feet of schools and playgrounds, and to low-level advertising inside stores. They do not affect other forms of advertising, such as direct mail or newspapers. They also do not resemble complete-speech regulations, which have failed this prong of Central Hudson, involving complete bans on price advertising of alcohol or prescription drugs, or broad prohibitions on advertising by lawyers. *See, e.g., 44 Liquormart*, 517 U.S. at 484, 116 S. Ct. 1495; *Bates v. State Bar of Arizona*, 433 U.S. 350, 365, 97 S. Ct. 2691, 53 L. Ed.-2d 810 (1977); *Virginia Bd. of Pharmacy*, 425 U.S. at 770, 96 S. Ct. 1817.

The Attorney General also asserts that there are no obvious less burdensome alternatives to the challenged Regulations. He points out that there is already a large, sustained effort in Massachusetts to reduce the illegal

purchase and use of tobacco by minors. This effort, however, has not significantly lowered the rate of underage tobacco use. *See* Def.'s Mot. at 18. The government believes that targeting the development and maintenance of the desire of children to use tobacco through the regulation of advertisements is a reasonable next step in trying to address the problem.

In response to these points, the Tobacco Companies first challenge whether a restriction on speech itself is narrowly tailored to suit the objectives, in light of alternatives. They point out that there is "a wide array of alternatives" that could be implemented instead of a restriction on speech. Those alternatives include more rigorous enforcement of illegal sales, licensing supervision, prohibiting the possession of tobacco by minors, educational programs, and counter-advertising. *See* Pls.' Opp'n at 13-16. Certain Supreme Court decisions have found persuasive weight in the existence of alternatives when deciding whether a law is narrowly tailored to suit governmental interest. *See Greater New Orleans Broadcasting*, 527 U.S. at ---, 119 S. Ct. at 1934 ("There surely are practical and nonspeech-related forms of regulation--including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements--that could more directly and effectively alleviate some of the social costs of casino gambling."); *44 Liquormart*, 517 U.S. at 486, 116 S. Ct. 1495 ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state's goal of promoting temperance."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n. 13, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993) ( "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is

certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable"). These cases are distinguishable, however.

In Greater New Orleans, the regulation prohibited advertising by private casinos, and thus, more severely impacted casinos run by non-Indians than those run by Indian tribes. The Supreme Court found that this kind of regulation, based on the identity of the owners or operators of the casino, was not tailored to the purpose of reducing the incidence of gambling. In *44 Liquormart*, the government banned the advertising of alcohol prices in an effort to promote temperance. There was no showing that other methods, such as a direct price increase, would not also have promoted temperance. Nor did the government show that the restriction would materially advance the government interest (the third prong of the Central Hudson test). In Discovery Network, the ordinance involved prohibited distribution of "commercial handbills" in order to remove certain news racks from city streets. This method of indirectly targeting certain newsstands did not suit the interest in "ensuring safe streets and regulating visual blight" in Cincinnati. Thus a more direct regulation concerning size, shape or location of the stands, rather than a ban on the stands based on the content of their materials, would be a far better fit.

The Attorney General has indicated, and it is undisputed, that numerous efforts are and have been underway to combat underage smoking. These include education, enforcement, and counter-advertising. *See* Def.'s Mot. at 18. They have been recognized as some of the leading programs in the country. *See* Def.'s Reply at 13. Although they have had some effect, underage smoking still remains a problem in Massachusetts. Although these efforts could be expanded infinitely, the Attorney General has shown that advertisements have a relationship to underage

smoking, making a regulation of that form of speech potentially sufficiently tailored to meet the government objective in satisfying Constitutional requirements. All he needs show is a reasonable "fit" to the underlying goal. *See Greater New Orleans Broadcasting*, 527 U.S. at ----, 119 S. Ct. at 1932.

There will always be alternatives to regulating speech. Almost any restraint made on speech could have, alternatively, a corresponding restraint on action that the speech is designed to curtail. This cannot mean that every social problem that can be addressed both by direct legislation controlling the act and by indirect legislation regulating the communication of information related to the act must be pursued by direct legislation regulating the underlying action to the point of exhaustion. It is up to the legislature to decide what combination of restraints best addresses its interest, so long as the restraint on speech is narrowly tailored to address that interest.

This Court is unpersuaded that the Commonwealth cannot, at all, use speech- targeting restrictions until a "myriad of alternatives" is tried and found wanting. In the context of underage smoking, that rule would delay the government in using what may very well be a most effective way to prevent teenagers from starting smoking and becoming addicted to nicotine. In light of the marginal success of all its various other initiatives, an initiative targeting advertising is capable of being narrowly tailored to the interest in reducing underage smoking. The question that remains, of course, is whether the Regulations are so tailored.

The Tobacco Companies argue that even if some restriction on their speech is permissible, the Attorney General's specific Regulations are more extensive than necessary. In particular, they claim the 1000-foot radius surrounding schools and playgrounds is too large, and the

5-foot restriction on indoor advertising within that 1000-foot zone is illogical. *See* Pls.' Mot. at 18.

The Tobacco Companies submit affidavits showing that the zones envisioned by the challenged Regulations would cover between 87 and 91 percent of the land areas in the cities of Boston, Worcester and Springfield.[9] *See* Pls.' Mot. at 18 n. 19. This effectively bans nearly all outdoor advertising, and captures nearly all retail establishments in those cities.

The resulting dilemma should appear quite obvious. If the government were to expand this zone to an extremely large radius surrounding schools and playgrounds (let us say, for sake of argument, 5 miles), the zone would become meaningless. It might cover the entirety of the Commonwealth without acknowledging that it is a total advertising ban inherently achieving a different or additional governmental purpose. If the Attorney General claims to be protecting children from being encouraged to smoke, his Regulations must be in some way narrowly tailored to apply to the exposure of children to tobacco advertisements. Using the articulated legitimate government purpose of protecting children to uphold a regulation which effectively shields everyone from viewing tobacco advertising would be improper[10] and would seemingly violate the final prong of the Central Hudson test. The regulations must not "burden substantially more speech than necessary." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430, 113 S. Ct. 2696, 125 L. Ed. 2d 345

---

[9] The methodology of some aspects of this analysis is challenged by the Attorney General, *see* Def.'s Resp. at 17 n. 19, but the point remains that the restriction is extensive.

[10] The question of whether shielding all persons from viewing tobacco advertisements is a legitimate government interest properly addressed by the Regulations is not at issue in this case, and this Court declines to address it.

(1993). The government must show, somehow, that the decision to choose 1000 feet as the target zone is narrowly tailored to effectuate the governmental purpose.[11]

At oral argument, the Attorney General agreed with the Tobacco Companies' speculation that the choice of a 1000-foot zone was based on tobacco billboard advertising restrictions developed by the Food and Drug Administration (the "Administration").[12] See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed.Reg. 41,334-335, 41,374 (1995) (to be codified at 21 C.F.R. § 897.30(b)) (proposed Aug. 11, 1995). The 1000- foot restriction derived originally from the Administration's proposed regulations on tobacco advertising is now rendered moot in Massachusetts by virtue of the settlement agreement reached in 1998 between

---

[11] Just prior to the release of this Memorandum and Opinion, this Court received a letter from the Attorney General indicating certain amendments to the Regulations. *See* Letter from William W. Porter, Jan. 19, 2000. The pertinent part of the amendments removes the text in 940 C.M.R. §§ 21.04(5)(b) and 22.06(5)(b) which reads "accessible to persons younger than 18 years old" and replaces it with "which is not an adult-only retail establishment." *See id.*, Attachment A. "Adult-only retail facility" (the Court assumes the mismatch is unintentional) is defined as "a facility where the retailer ensures that no person younger than 18 years old is present or permitted to enter at any time." This amendment clarifies the provision by replacing the vague word "accessible," and tailors the regulation by exempting establishments where children are unlikely to enter. It does not, however, address the issue of the permissible zone of regulation for all the establishments that are not "adult-only." The Court's concern regarding the 1000-foot zone continues.

[12] "[W]here we got the thousand feet quite simply is that's what the FDA determined." Tr. of Mot. Hr'g, Dec. 2, 1999 at 5.

the industry and 46 states.[13] [FN13] The Tobacco Companies argue, and the Attorney General seemed not to disagree at oral argument, that the 1000-foot restriction was based on the Administration's analysis of the visibility of large billboards. While it may be true that the Massachusetts settlement resulted in a "voluntary" ban of billboard cigarette advertising, an examination of the proposed federal regulations shows that the Administration contemplated all forms of outdoor advertising. The Massachusetts settlement may have rendered the applicability of that regulation moot with respect to billboard advertising, but the settlement does not narrow the intended scope of the contemplated federal regulations as expressed in the text of the regulation itself.

The text accompanying the Proposed Rule uses the general term "outdoor advertising". *Id.* at 41,315, 41,334, 41,357. Furthermore, the text of the proposed regulation itself explicitly includes many forms of advertising: "No outdoor advertising, including but not limited to billboards, posters, or placards, may be placed within 1,000 feet of any playground, elementary school or secondary school." *Id.* at 41,334-335, 41,374 (to be codified at 21 C.F.R. § 897.30(b)). The Administration notes that "[t]hese are places where children and adolescents spend a great deal of time and should therefore be free of advertising for these products. The agency believes that this [is] a reasonable restriction." Id. at 41334.

Of course, any numerical limit bears some degree of arbitrariness. It is not the role of the Courts to choose the proper number for the legislature in order to make the

---

[13] The settlement agreement resolved the lawsuit of *Massachusetts v. Philip Morris Inc. et al.*, No. 95-7378-J (Sup. Ct. Mass. 1998). As part of the settlement of that case, the Tobacco Companies are now contractually barred from billboard advertising.

Regulations valid. The government must show it has narrowly tailored its regulation to effectuate its purpose. A numerical limitation selected with no particular logical rationale is insufficient to meet this burden, especially when that limit exhibits a real danger of swallowing up everything by being de facto no limit at all.

Here, however, the Attorney General has relied on the conclusions of a federal agency engaged in the very same objective: the protection of children from tobacco products. The Administration selected 1000 feet as the appropriate zone, and described that zone as inclusive of places where children spend a lot of time. This Court will not second-guess the Attorney General's decision to rely on the Administration's conclusions in selecting the numerical limit of a zone of regulation.

That reliance, however, must be seen to relate to substantially the same subject matter. Although the Administration's proposed regulations address all forms of outdoor advertising, they do not address indoor advertising in stores near schools or playgrounds. It may seem to be common sense to conclude that children frequent stores within the areas in which they spend the most time. But there is a perceptible difference between places where children simply travel as they go to school or to the playground, and the interior of places where they choose to spend their money. The former involve areas in which children are unlikely to exercise voluntary control because they are merely observing advertisements on the way to their usual destination. It is also likely to be a daily, repetitive exposure of a long duration. The latter situation is an actual destination of a child with a purpose in mind--to spend money. The transaction is occasional and brief, but it occurs at the vulnerable moment of a commercial transaction, at the situs where cigarettes are actually sold. Whether these (or other) differences are significant is not

for this Court to decide. It is enough that the rationale pointed to by the Attorney General for selecting a 1000-foot perimeter fails to indicate narrow tailoring with respect to retail stores containing indoor advertisements. The Administration never delineated what the proper zone would be, if any, for regulation of indoor advertisements in stores near schools or playgrounds.

The Tobacco Regulations therefore pass the four-part Central Hudson test with the exception of 940 C.M.R. § 21.04(5)(b), the provision relating to point-of-sale advertising. The Attorney General has failed to demonstrate that 940 C.M.R. § 21.04(5)(b) is "not more extensive than is necessary to serve the government interest" because its sole justification for the selection of a 1000-foot zone relates to conclusions by a federal agency concerning outdoor advertising. For the same reason, the companion Cigar Regulation at 940 C.M.R. § 22.06(5)(b) cannot stand.

Under 940 C.M.R. § 21.06 (and the Cigar Regulations' companion § 22.08), the point-of-sale advertising provision can be severed from the rest of the regulations. The outdoor advertising restrictions in 940 C.M.R. § 21.04(5)(a) thus stand.

## V. ANALYSIS RELATING TO CIGAR REGULATIONS

### A. The Cigar Regulations

The Attorney General and the Cigar Companies have filed cross-motions for summary judgment testing the validity of provisions in the Cigar Regulations imposing warning label requirements on cigar packaging and advertising, and advertising restrictions paralleling the Tobacco Regulations. These Cigar Regulations express a purpose similar to the Tobacco Regulations, with the additional aspiration that

> Massachusetts consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes by requiring the cigar industry to include health warnings on the package labels of cigars sold and distributed within Massachusetts and in the advertisements of such products within Massachusetts ...

940 C.M.R. § 22.01.

B. First Amendment Challenge to the Advertising Provisions of the Cigar Regulations

In addition to echoing the First Amendment argument advanced by the Tobacco Companies, the Cigar Companies argue that cigars are distinguishable from cigarettes and that this distinction entitles their products to a differential First Amendment analysis.

The Cigar Companies point out several differences between the cigar market and the cigarette market. See Pls.' Opp'n (Cigar Warnings) at 3-5. By way of summary, the main points are that (i) the cigarette manufacturers spend over 100 times more on advertising than do the cigar companies; (ii) the Food and Drug Administration, in 1996, decided not to include cigars in its regulation of tobacco because of insufficient evidence of use by children or adolescents; (iii) the cigar companies do not use billboards and engage in relatively little magazine and newspaper advertising; and (iv) cigars involve a "tactile interaction" at the point of sale in which consumers like to feel, smell, and look at the quality of the cigar prior to purchase. See id.

The crux of the Cigar Companies' argument about product distinctions falls on parts three and four of the Central Hudson test, outlined supra. Namely, the argument implicates the questions of whether the regulation advances

the governmental interest and whether the regulation is not more extensive than necessary.

1. Advances the Governmental Interest and is No More Extensive than Necessary

The Cigar Companies argue their products are materially distinguishable from cigarettes because of the different nature of the cigar market.[14] The Attorney General has imposed upon them the burdens of advertising regulations in the absence, they argue, of any evidence that cigar advertising increases youth consumption of cigars.

If the Attorney General has no evidence at all to support a link between advertising and underage cigar smoking, it would seem that the Cigar Companies' argument is valid. That is to say, where a product subject to advertising regulations is related to but materially distinguishable from a product whose advertising is legitimately regulated, the Attorney General must show, under Central Hudson, how regulation of the distinguishable product also materially advances the governmental interest. If, however, the products lack material differences, it is appropriate that the Regulations cover both without a separate First Amendment analysis.

The Cigar Companies claim that there is no logical reason to believe that the Cigar Regulations will reduce youth access to cigars, and no studies so finding. Thus, they argue, the portions of the Cigar Regulations related to indoor and outdoor advertising, 940 C.M.R. § 22.06(5)(a) and (b), fail to satisfy the third and fourth parts of Central Hudson because the Regulations do not advance the governmental interest.

---

[14] Unfortunately, the familiar adage attributed to Sigmund Freud that "sometimes a cigar is just a cigar" does not instruct this Court on whether a cigar is ever a like a cigarette for purposes of the First Amendment.

The Attorney General's response is that there is sufficient evidence for the Regulations to treat cigarettes and cigars alike. *See* Def.'s Mem. (Cigar Warnings) at 2. The similarities between the products pointed out by the Attorney General relate to chemistry, disease consequences, trends in consumption, and marketing practices. It is, of course, unlawful for minors to purchase cigars. It also seems fairly clear that the toxicity and disease consequence of cigars are similar to that of cigarettes, invoking a similar underlying governmental interest in regulating youth consumption.[15] The Attorney General claims that data, more recent than those cited by the Cigar Companies, show alarming rates of youth cigar use and an increase in youth cigar use. See id. at 4-6. Furthermore, the Cigar Companies' efforts to promote cigars as symbols of success, elegance, and athleticism create a risk that children will find the advertisements increasingly appealing, especially in light of the lower number of visible cigarette advertisements. *See generally* the glossy magazines Cigar Aficionado and Smoke. The editorial policies of each promote cigar smoking as the path to "the good life" and a "distinctive lifestyle." According to the Attorney General, the Federal Trade Commission found that cigar advertising increased by 32 percent in the two-year period from 1996 through 1997. *See* Def.'s Mem. (Cigar Warnings) at 4. A 1996 survey shows that 26.7 percent of fourteen to nineteen year-olds had smoked at least one cigar in the preceding year. *See id.* It is logical for the Attorney General to accept the proposition that cigar advertising has similar effects on

---

[15] The Attorney General does not have to establish a link between smoking and health to survive First Amendment scrutiny. The true relevant analysis is that the purchase of cigars is unlawful for minors and thus the government has an interest in promoting compliance with that law. The Regulations must advance the governmental interest in promoting compliance.

underage smoking as cigarette advertising, even though there have been fewer studies so to demonstrate. The last thing the Attorney General would desire is to shift children from purchasing cigarettes to purchasing cigars by allowing the growth of cigar advertising in place of cigarette advertising. Although the increase in cigar smoking may be a passing "trend," as suggested by the Cigar Companies at oral argument, the Commonwealth can respond to that trend or take action either to further its demise or prevent its recurrence. There is thus support for treating the cigars as indistinct from cigarettes.

Additionally, the Cigar Regulations can be supported on the rationale that the cigars, even if distinguishable, are separately subject to regulation under Central Hudson because they create an interest by minors to which the Attorney General has responded with an effective and narrowly-tailored regulation. It seems reasonable to this Court for the Attorney General to be concerned about youth consumption of cigar tobacco in the same way it is concerned about cigarette tobacco. The Attorney General should not have to wait until there is a new epidemic of underage cigar smokers in order to enact regulations intended to prevent that very epidemic. Cigars may not be as popular as cigarettes, but they are just as illegal for minors to purchase, and they, therefore, carry just as much of a government interest as cigarettes. The differences may be akin to those among beer, liquor, and wine. Although underage drinkers may prefer beer and liquor to wine, that does not call for a differential First Amendment treatment of regulations restricting advertising of those products. Nor would the connoisseur aspect of wine or its more upscale advertising methods cause this Court to ignore it as an alcohol product. So, too, cigars. Given the showing of a legitimate reason to roll cigars into the comprehensive but tailored plan to combat underage smoking, this Court will

not second-guess the wisdom of the Attorney General's decision to act now. This Court concludes that to the extent that they materially differ in nature, cigars and cigarettes are so interrelated and implicated in the same governmental interest as to be capable of identical regulation.

As this Court rules that cigars and cigarettes are indistinguishable for the purposes of First Amendment advertising protection, the Central Hudson analysis is the same as that for cigarettes. The remaining parts of the Central Hudson test are analyzed, and the conclusions reached, in the same manner as they were for the other tobacco products. Consequentially, the Attorney General has satisfied the Central Hudson factors in all but one area. He has not demonstrated that the Commonwealth's regulation of indoor point-of-sale advertising is no more restrictive than necessary. The selection of the 1000-foot zone around schools and playgrounds cannot be supported by a contemplated federal regulation relating to outdoor advertising. *See* discussion supra Part IV.B.2.c. Section 22.06(5)(b) is therefore invalid.

2. Restrictions on Retail Practices

The Cigar Companies' have also expressed First Amendment concerns regarding the physical location of cigars in stores. These concerns are not properly examined under a First Amendment analysis because they do not implicate speech or expression.

First, the Cigar Companies lament the prohibition of self-serving displays of cigars by 940 C.M.R. § 22.06(2)(c). In the context of cigarette sales, self-service displays are not advertisements whose speech or expression is protected. *See Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 420-21 (D. Vt. 1998). So, too, cigar self-service displays. It is irrelevant that cigars come in different varieties or that some customers like to handle the cigars before purchasing

them. These are characteristics of the commodity itself, not indications that protected expression exists. Stores are already in the practice of keeping certain tobacco products behind the counter. If cigars must likewise be locked up or placed out of reach as a result of these regulations, that cannot properly be said to pose First Amendment problems distinguishable from those occasioned by restrictions on cigarette sales practices. Although aroma, feel, and look may be important "information" for cigar consumers, that information is neither speech nor expression. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) (where a village regulated sale of items near display of literature encouraging illegal use of drugs, "the village [did] not restrict speech as such, but simply regulate[d] the commercial marketing of items"). For consumers seeking that information, cigars may be examined on request at the store. Furthermore, the fact that many cigars are today mass-packaged without ability for individual examination makes this argument mostly spurious.

Second, the Cigar Companies also object to the ban on cigar sampling and promotional give-aways located at 940 C.M.R. § 22.06(1)(a). This restriction arguably may hinder channels of "communication" to adult consumers by depriving them of the information contained within the product itself. That argument is flawed. If accepted, the argument would implicate every commercial transaction regulation in the country in a First Amendment analysis because any sale or give-away of a product inherently conveys information about that product itself. This is simply a misreading of the reach of the First Amendment. The restrictions on sales restrictions at § 22.06(1) and (2) are valid.

C. Challenges to the Cigar Warning Requirements

1. The Relevant Cigar Regulations

The Cigar Regulations require that packages of machine-made cigars and cigar advertising carry warnings that cigars are not a safe alternative to cigarettes and that cigar smoke contains carbon monoxide and nicotine (the "Warnings"). See 940 C.M.R. §§ 22.04-22.05. The Attorney General has asked for summary judgment declaring that the Warnings do not violate the First Amendment and the Commerce Clause. The Cigar Companies have filed a cross-motion for summary judgment on the same grounds.

The Attorney General has extensively outlined the health risks of cigars and the growing popularity of cigars in his memorandum. *See* Def.'s Mot. (Cigar Warnings) at 3-5. The Warnings are intended to fill in the gap in federal health warnings, which apply only to cigarette and smokeless tobacco packages, and to provide consumers with information about the dangers of cigar smoking. These Warnings must occupy 25% of the front or top panel of the package (whichever is larger) in clear and conspicuous black-and-white print. See 940 C.M.R. § 22.04(2). The 25% warning allocation space may also be used for any federal, state or local warnings that may be required, so long as the Massachusetts warnings remain clear and conspicuous. See 940 C.M.R. § 22.04(2)(b). The regulations also require 20% of any cigar advertisement to include the Warnings. See 940 C.M.R. § 22.04(2). The use of a pre- printed sticker affixed to the package or advertisement constitutes compliance. See 940 C.M.R. § 22.04(2)(b).

2. First Amendment Analysis

The Attorney General argues that the Warning provisions do not violate the First Amendment. Product disclosure and warning requirements are generally upheld if they are reasonably related to the state's interest in

preventing deception of consumers. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985). "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides [citation omitted] [the] constitutionally protected interest in not providing any particular factual information in [ ] advertising is minimal." *Id.* at 651, 105 S. Ct. 2265. The Attorney General points out that consumer product warnings are commonplace and have long served to inform consumers of the risks of such products as cigarettes, alcohol, prescription drugs, pesticides, raw milk, and hazardous substances. Citing cases that have upheld such warnings, the Attorney General asserts that the Warnings are reasonable and require no further scrutiny under the First Amendment. *See* Def.'s Mem. (Cigar Warnings) at 8-9. Since it is the regulation that declares the cigar advertisements "unfair or deceptive," rather than any particular words in the advertisements themselves, this argument is too superficial to resolve the issue.

The Attorney General continues with a Central Hudson analysis in which he argues that the Warnings' requirement satisfies all four prongs of the test.[16] It seems clear that the health effects of cigar smoking on Massachusetts consumers are a substantial state interest, easily satisfying the second Central Hudson prong.

Mandatory labeling warnings seem particularly suited to advancing the state interest in informing consumers of hazards, because they are delivered at the point of consumption. Courts have, therefore, found the third prong

---

[16] The first prong, eligibility for protection, he seems to admit or ignore. Since cigars are legal, this Court assumes their packaging and advertising is also legal and thus protected.

of Central Hudson easy to satisfy in the context of product warnings. *See In Re R.M.J.*, 455 U.S. 191, 201, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); Bates v. State Bar of Arizona, 433 U.S. 350, 375, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) ("the preferred remedy is more disclosure, rather than less"). Central Hudson itself suggested that it might be permissible to "require that advertisements include information about the relative efficiency and expense of the offered service." 447 U.S. at 571, 100 S. Ct. 2343.

The Cigar Companies advance several reasons for why they believe the Warnings will not advance the governmental interest. These include the argument that the labels will be ignored over time and will not be visible behind the counter. Furthermore, one aspect of the Warnings' text[17] advises consumers about the ingredients of cigar smoke but does not directly inform anyone whether or not cigar smoking is addictive or dangerous. The Cigar Companies argue that these warnings cannot further the governmental purpose in warning consumers about the dangers or addictive properties of cigar smoke because they do not identify any specific risks associated with cigars. This argument is disingenuous--it suggests that the Cigar Companies would support warning language that more clearly condemns their products, warnings which directly assert the dangers of cigar smoke, rather than a requirement merely to list important ingredients.

The argument is unpersuasive, in any event. The first warning alerts the consumer to important contents of cigars, one of which (nicotine) is an "addictive drug" and the other of which (carbon monoxide) is commonly known to be

---

[17] The Warnings require rotation of the following two statements: "WARNING: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug" and "WARNING: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products."

hazardous. The other indicates the danger of cigars by comparing them to cigarettes, the dangers of which many consumers already know. These advance the governmental interest in consumer knowledge and awareness of the nature of cigars. The Cigar Companies' semantic quibbles are not persuasive. It is not necessary that the government pick the absolute most effective warning text for a package to pass this prong of Central Hudson. Rather, the government must select some language which directly advances its interest. Here, it has done so. The Warnings' requirement satisfies the third prong of Central Hudson.

The Attorney General next argues that the Warnings' requirement comports with the final prong of the Central Hudson analysis by being narrowly tailored to serve the governmental interest. He bases this argument on the fact that the Warnings do not limit speech but rather provide important additional information in a place noticeable by the consumer. *See* Def.'s Mem. (Cigar Warnings) at 13. He provides several examples of how the law is tailored to suit its objectives. The Warnings are formatted to be simple and easy to see. They cover only 25% of one side of the package (or 20% of advertisements). *See* 940 C.M.R. §§ 22.04(2), 22.05(2). The Warnings do not apply to hand-rolled cigars. See 940 C.M.R. §§ 22.03, 22.04. The warning area may be allocated to other required warning uses. *See* 940 C.M.R. § 22.04(2)(c). A sticker may be used to simplify the transition and administration of the labeling. *See* 940 C.M.R. § 22.04(2). The Attorney General argues that these and other characteristics of the Warnings make them narrowly tailored to address the governmental interest. This Court finds the argument persuasive.

The Cigar Companies' attack based on the fourth prong of Central Hudson rests on the burden the Warnings impose. *See* Pl. Resp. (Cigar Warnings) at 15-18. The Warnings are described as so large and of such a format as

to eliminate print advertising for cigars. They argue that cigar manufacturers are unlikely to advertise if they must devote 20% to the Warning. In contrast, federal regulations do not require a certain proportion of the advertisement, but only require a "conspicuous" or "prominent" warning. Furthermore, there is no affirmative misleading communication on the packaging or in the advertising of cigars that needs such a drastic warning counter- message, unlike the situation in *Zauderer*, 471 U.S. at 652, 105 S. Ct. 2265.

Although these are thoughtful points, and the burden imposed on the cigar industry is not light, the Warnings' requirements are adequately tailored for the government's purpose. It is doubtful that Cigar Companies will stop advertising due to a 20% increase in the cost of running their advertisements (to account for the 20% loss of space). They will simply, it can be imagined, pass that cost along to the consumers or pay for advertisements that are smaller overall. The Cigar Companies have already admitted that their advertising budget is 100 times smaller than the cigarette companies' budgets, see Pls.' Opp'n (First Amendment) at 3-4, so the thought that this regulation might cripple the industry is absurd. Furthermore, the packaging requirements leave most of the packaging available for industry use, and incorporate the flexibility of sticker-based compliance. The Attorney General has not overstepped the limits of the First Amendment in crafting his Warnings requirements. The Warnings are a valid exercise of warning-label regulation under the Central Hudson framework.

3. Commerce Clause Analysis

The Cigar Companies have also challenged the Warnings' requirements on the basis of the Commerce Clause. The Cigar Companies argue that commerce in cigars is national in scope, and that individual state

regulation over cigar packaging will result in inconsistent standards, will have the effect of controlling conduct outside of the state, and imposes a burden which outweighs any local benefits.

It is critical to note at the outset that this is not a case that involves discrimination against out-of-state economic actors. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). A discriminatory state regulation would be subject to strict scrutiny, see id., but state laws that are evenhanded in application are generally upheld under the Commerce Clause unless the burden imposed on interstate commerce is excessive in relation to the local benefits of the laws. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The Cigar Regulations do not in any way discriminate among cigar manufacturers. A Commerce Clause analysis of the burdens and benefits of the Cigar Regulations is therefore in order. Before proceeding to that analysis, however, this Court will address the Cigar Companies' arguments relating to a "per se" theory of violation of the Commerce Clause.

a. National Uniformity

The Cigar Companies first challenge the Warnings' requirements on the ground that they require national uniformity. There exist "those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767, 65 S. Ct. 1515, 89 L.Ed. 1915 (1945). This theory essentially recognizes that the Commerce Clause can, by its own force, pre-empt entire fields of commerce from state regulation. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978); *Hunt v. Washington Apple Advert. Comm'n*, 432 U.S. 333, 350, 97 S. Ct. 2434, 53 L. Ed. 2d 383

(1977) ("the Commerce Clause acts as a limitation upon state power even without congressional implementation"). This kind of invalidation of state regulation is rare, however, and is invoked only when a lack of national uniformity would impede the flow of interstate goods. *See Exxon*, 437 U.S. at 128, 98 S. Ct. 2207.

In support of their argument that the cigar market requires uniform national regulation, the Cigar Companies point out that a regulation by California requiring a warning on all cigars has resulted in those California warnings appearing on 90% of all cigar packages in the United States and that the addition of other warnings from other states will result in multiple warnings on the same packaging. *See* Pls.' Resp. (Cigar Warnings) at 3. They fear that several pending proposed regulations could require as many as three changes to the packaging in one year.

The Attorney General, however, makes it clear that the Cigar Regulations do not impose labeling burdens on packages appearing outside Massachusetts. If the Cigar Companies decide to label all their packages the same way, nationally, for efficiency, that is their choice and not the direct result of the Cigar Regulations.

The Commerce Clause protects the interstate market, not the right to conduct business in the most efficient manner. *See Exxon*, 437 U.S. at 127- 8, 98 S. Ct. 2207. Although the Cigar Companies may prefer internally to consider the cigar market national in scope, there is no inherent reason why the packaging and advertising cannot be managed locally, especially when the regulations allow for sticker-based warnings that can be applied as soon as the cigars enter the destination state from the point of manufacture.

The only conceivable reason to find a "per se" violation of the Commerce Clause here under Southern Pacific would be

for this court to find that the Cigar Companies' management decisions themselves have created a market that is fundamentally national in scale. To do so would allow manufacturers to avoid state regulation, under the guise of Commerce Clause protection, through marketing decisions that the manufacturers themselves create, promote, and control. Virtually every consumer goods industry could escape state regulation under that proposed standard merely by implementing a centralized packaging and distribution scheme for their products. Those business decisions do not take a market of recreational consumer goods typically sold in local stores and automatically turn that market into one requiring national uniformity in regulation. The Cigar Warnings are not invalid on the basis of Southern Pacific or its progeny.

b. Interference with Commerce in Cigars Outside Massachusetts

Advancing an argument similar to the previous one, the Cigar Companies argue that the practical effect of the Warnings' requirement is to control conduct beyond Massachusetts. They reach this conclusion by adverting to the channels through which cigars are advertised. These include national magazines and the Internet. It is argued that "the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Institute*, 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989).

The Cigar Companies claim that they would be required to design, produce, and inventory Massachusetts' labels for all of their transactions in order to ensure their compliance with the Regulations. Using a point-of-sale sticker system would not solve this administrative problem, it is argued, because the Warnings' requirements make it illegal to import for sale cigars without the Warnings. Thus, goes the argument, the labeling must be done prior to entry into

Massachusetts, having an impact on commerce outside the Commonwealth. The Cigar Companies also fear that they would have to include the Massachusetts Warnings in national advertisements, including the Internet, that could be viewed in the Commonwealth to satisfy the advertising requirements.

The Attorney General responds that the Cigar Companies have made no effort to determine the actual cost or feasibility of alternative packaging and simply stand behind the status quo for efficiency purposes. He also points out that most cigar advertising is regional and will not require the placement of Massachusetts Warnings on national advertisements unless the Cigar Companies find that more convenient.

The Cigar Companies have demonstrated areas of legitimate concern where the Cigar Regulations may inadvertently have consequences on out-of-state economic activity. The Supreme Court has made clear, however, that the indirect effects on interstate commerce arising from a state regulation are subject to analysis under Pike and not subject to strict scrutiny under a theory of "per se" violation of the Commerce Clause. The Supreme Court acknowledged that "there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). Even *Healy*, 491 U.S. at 336, 109 S. Ct. 2491, which the Cigar Companies quote to support their "practical effect" argument, invoked the idea of "practical effect," but did so in the context of a regulation that "directly control[ed] commerce occurring wholly outside the boundaries of a State," in the absence of legislative intent to so control commerce. The law struck down in Healy required every

liquor distiller or producer that sold liquor to wholesalers within New York to sell at price that was no higher than the lowest price the distiller charged wholesalers anywhere else in the United States. Healy contained a clear example of a regulation that facially contemplated intrastate transactions but that had a practical direct effect of local protectionism, as the Supreme Court recognized. *See id.* at 339, 109 S. Ct. 2491. The Cigar Regulations have neither the intent nor the direct practical effect of discrimination or local protectionism. It concerns information on the packages of products sold within Massachusetts regardless of who sells them and regardless of what other states are doing to inform their own citizens of the health risks of cigar smoking. Thus the Cigar Companies' concerns about "practical effects" are more properly considered under the Pike balancing test, infra.

c. Burdens on Interstate Commerce that Outweigh the Putative Local Benefits

Using arguments similar to those used above, related to the marketing and advertising mechanisms used in the cigar market, the Cigar Companies argue that the Warnings' requirements impose a burden on interstate commerce that outweighs the local benefits behind the Cigar Regulations. This theory emerges from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S. Ct. 813, 816, 4 L. Ed. 2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of

course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The Cigar Companies first argue that Pike only applies to exclusively local interests, based on its language, and that matters of national concern are not local interest that can ever outweigh the interests of interstate commerce. This is nonsense. Every local issue has some aspect of interest to the nation as a whole. The Supreme Court has recognized national concerns as legitimate state interests under the Commerce Clause. *See, e.g., Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 473, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981) (conservation of energy and natural resources).

The Cigar Companies point to equally effective alternatives that are less burdensome on interstate commerce, such as a warning display sign at retail outlets, public education,-or adopting the California warning. In Massachusetts, however, many such alternatives are already in effect but seem to have had minimal impact on further educating the public about the risks or reducing the incidence of cigar smoking. Although the Cigar Companies are correct that there are alternatives that will have less, or indeed no, impact on interstate commerce, the Commonwealth does not need to resort to such alternatives. Pike envisions a showing that the burden is "clearly excessive" in relation to local benefits. "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Clover Leaf*, 449 U.S. at 471, 101 S. Ct. 715 (quoting *Pike*, 397 U.S. at 142, 90 S. Ct. 844). The local benefits here are compelling--to educate consumers about what they are purchasing and to inform them of the undisputed health dangers of cigar smoking. The burden

imposed on the industry is not excessive, in light of such a strong local interest. Rather, it reflects the implementation of feasible warning labeling similar to that found on other products. This Court need not engage in a fact-intensive balancing analysis of the benefits and burdens. "[O]nly the most minimal sort of balancing, if any, is necessary." *National Kerosene Heater Ass'n v. Massachusetts*, 653 F.Supp. 1079, 1092 (D.Mass.1986) (Skinner, J.).

With the strong local interest clearly shown, it remains to inquire about the burden on interstate commerce. The Cigar Companies have repeatedly claimed that the Regulations may result in costly modifications to their packaging operations. The Attorney General responds to the Cigar Companies' repeated cries concerning the infeasibility of modifying their packaging systems by pointing to the corporation, John Middleton, Inc., which has been distributing cigars in California with the California warning, and elsewhere without any warning. They also point out that tax regimes in certain states such as Alabama and Arizona require state-specific tax stamps to appear on the packages. In another example, Iowa allows escape of certain tax liabilities by using the wording "two for the price of one" rather than "buy one get one free," and Cigar Companies have modified packaging for those purposes. *See* Def.'s Opp'n (Cigar Warnings) at 5.

The fact is that modern companies are capable of adapting to the packaging requirements of individual states and have been doing so in many different industries. Although this change may require retooling of certain structures, or coordination with the retailers, the Warnings labeling is possible and reasonable. By relying on a national system of packaging, the Cigar Companies have established an efficient labeling system, but efficiency fails to overcome the strong local interests of the Commonwealth in protecting the health and consumer choice of its citizens.

may be time for Congress to step in with a national cigar labeling program and pre-empt the states in this area, but until it does so, it is unreasonable to force Massachusetts to wait and allow its citizens to remain deprived of important consumer health information.

The Cigar Companies do raise legitimate concerns about certain portions of the Cigar Regulations which seem especially likely to burden activities outside the state, depending on their interpretation. In particular, these concerns relate to the portions of the Cigar Regulations which seem to require that a Massachusetts Warning be present on the cigar package when the package enters the Commonwealth, and portions that seem to require warnings on national and Internet-based advertising. These portions are subject to a proper narrowing construction by this Court. *See Rhode Island Assoc. of Realtors, Inc. v. Sheldon Whitehouse*, 199 F.3d 26, 35-36 (1st Cir. 1999) ("Even when state officials fail to offer an authoritative interpretation of a state statute, a federal court considering a pre-enforcement challenge sometimes will presume a narrowing construction to which the law is fairly susceptible.") (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n. 11, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) ).

This Court holds that the language in 940 C.M.R. § 22.04(2) can be interpreted to allow compliance when the warning labels are affixed by the last retailer on the chain of commercial distribution prior to sale. That is because the failure to include the Warning is rendered a "deceptive act or practice" not when the goods cross the Massachusetts' state line, but rather when merchants "import for sale" the cigars. *See* 940 C.M.R. § 22.04(1)- (2). In order to lessen the Cigar Regulations' burden on interstate commerce, this Court construes that language to mean that the Cigar Companies may affix the warning sticker to the cigar package when the package has reached the ultimate

"importer for sale," namely the retail merchant, so long as the sticker is present by the time any end-consumers are able to view the package.

The word "distribute" also appears in these sections, *see id.*, but incidental "distribution" for the purpose of delivering the package through the stream of commerce to the end merchant ought not be captured by the statute. Rather, this Court rules that the word "distribute" refers to instances in which persons subject to the Cigar Regulations distribute directly to the end consumer, for example at factory outlets. A construction which would be broad enough to require the label to be affixed while the package is still in the hands of distributors or sub-distributors does nothing to further the purpose of the Regulations since it has no effect on the message ultimately presented to the cigar consumer. The Attorney General would surely agree that the ultimate local interest served by the Warnings is to inform consumers of the dangers of smoking cigars. Requiring a warning to be attached before consumers are in a position to see it is unnecessary to effectuate the goals of the law, and poses a significant burden on activities taking place outside the Commonwealth. The regulation's implementation should be limited to prevent that imbalance of interests.

This Court also has grave concerns that the Cigar Regulations, as they are written, might apply impermissibly to national magazines available for purchase in Massachusetts, or to the Internet. The Regulations render it an "unfair or deceptive act or practice" for any person "to advertise or cause to be advertised within Massachusetts any cigar or little cigars" without including the warnings comprising 20% of the area of the advertisement. 940 C.M.R. § 22.05. This broad language capturing the acts of persons who merely "cause to be advertised" cigar products seemingly imposes upon advertisers in national magazines, such as Cigar Aficionado and Smoke, the burden of including

a Massachusetts Warning in any magazine that distributes any of its copies to any Massachusetts readers. At oral argument, the Attorney General agreed that the Cigar Regulations could be construed to capture national magazines even though that was not the intent of the Commonwealth. *See* Tr. of Mot. Hr'g, Dec. 2, 1999, at 7. Such an interpretation would place a great burden on interstate commerce since it would require the Massachusetts Warning to be carried by a national magazine in order to ensure that any copies ending up in Massachusetts carry the Warning. This Court does acknowledge that the Commonwealth has a strong local interest in providing cigar information to its citizens who read national publications. It would be unfortunate if the Cigar Companies took advantage of this Court's limiting instruction to skirt the law by increasing their advertising in national magazines. The Cigar Regulations as a whole, however, provide ample opportunity for warning Massachusetts consumers, including local magazines, and on the packages themselves. Thus, the Commonwealth's local interest in capturing national magazines is outweighed by the burden it would place on interstate commerce. This Court holds that cigar advertisements in magazines or other print media that are truly national in distribution need not include the Massachusetts Warnings. If a magazine or other print medium has a "Massachusetts edition" in which the advertisements are selected or designated solely or especially for a Massachusetts audience, the burden on interstate commerce is minimal because the Cigar Companies can easily add the Warnings to the Massachusetts edition. In those cases only, the cigar advertisements in that magazine or other print medium are required to comply with the Warnings' requirements.

The Internet poses a similar issue by virtue of the fact that Internet-based advertising is targeted at no state in

particular, but at all states in general. Furthermore, the dynamic nature of text and images appearing on an Internet browser does not lend itself well to a regulation that sets aside a percentage of "area" of an advertisement. The Attorney General acknowledged, during oral argument, the uncertainty of the application of the Regulations to the Internet. *See* Tr. of Mot. Hr'g, Dec. 2, 1999, at 11. He later provided a letter to the Court expressing the position that the general warning requirement set forth in 940 C.M.R. § 22.05(1) applies to Internet advertising, while the Regulations specifying size and format requirements in 940 C.M.R. § 22.05(2) would not. *See* Letter from Jeffery D. Clements to Young, C.J. of Dec. 23, 1999 at 2. Although this may be the aspiration of the Commonwealth now, that construction has been expressed to the Court informally, not via the deliberate and important process of rulemaking. This Court will thus give a narrow construction to the provisions, and has no occasion to consider broader construction. Since cigar advertisements appearing on the Internet are not "within Massachusetts"[18] and since it seems plain that the Attorney General, in creating the Warning provisions, contemplated a tangible paper medium, this court holds that Internet advertisements are not subject to

---

[18] This conclusion seems accurate even in light of the Attorney General's desired use of the definition of "advertisement" in its Retail Advertising Regulations, 940 C.M.R. § 6.00. See Letter of Jeffrey D. Clements to Young, C.J. of Dec. 23, 1999 at 1. In that definition, "oral, written, graphic, or pictorial representations" within Massachusetts are contemplated, as is "any representation disseminated within Massachusetts if the advertisement is directed to consumers in Massachusetts." Id. at 1, n. 1 (quoting 940 C.M.R. § 6.01). Internet advertising is not directed to consumers in Massachusetts in particular, and therefore fails to fit the definition.

the Warnings' requirements in either 940 C.M.R. § 22.05(1) or (2).[19]

The Court's ruling with respect to the Internet does not necessarily compel the same conclusion with regard to electronic mail ("E-mail"). To the extent that E-mail represents an electronic replacement of the traditional letter and requires that the disseminator have some idea of the location (though not necessarily geographical situs) of the receiver of the advertisement, its regulation might impose a lesser burden on interstate commerce. *But see id.* at 171-72 (E-mail users cannot predict the geographical destination or origin of messages).

The Court has no occasion to consider these additional issues and merely reflects on them for the benefit of thorough analysis.

## VI. CONCLUSION

For the reasons set forth above, this Court declares that both the Tobacco Regulations and the Cigar Regulations, as construed herein, are valid exercises of the authority of the Attorney General with the sole exceptions of the parameters of the point-of-sale Tobacco Regulations, 940 C.M.R. § 21.05(5)(b), as amended through Jan. 19, 2000, and the cognate Cigar Regulations, 940 C.M.R. § 22.06(5)(b), as amended through Jan. 19, 2000. Additionally, this Court holds that cigar advertisements in national magazines and in other national media are exempt from the Warnings

---

[19] Even if the Commonwealth were explicitly to include Internet advertising in the Warnings' requirements, that regulation would likely run into significant difficulty under Pike due to the heavy burden it would place on interstate commerce. *See American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 169 (S.D.N.Y.1997) (using the Commerce Clause to strike down a New York statute making it a crime to disseminate obscene materials to minors via the Internet).

requirements of 940 C.M.R. § 22.05. Nothing herein prevents the Attorney General from adopting a broader construction of his regulation than this Court here affords, so long as he proceeds by express formal rulemaking subject to challenge by the affected parties. Likewise, he may immediately choose to adopt some parameter for point-of-sale regulation so long as he proceeds in like fashion and justifies his delineation. Those matters are not, however, now before this Court. The cross motions of the parties are thus allowed in part and denied in part in accordance with this opinion. [Docket Nos. 32, 48, 78, and 84.] Judgment will enter as declared above.

SO ORDERED.

WILLIAM G. YOUNG

CHIEF JUDGE

# APPENDIX C

## TITLE 940: THE OFFICE OF THE ATTORNEY GENERAL
## CHAPTER 22.00: SALES AND DISTRIBUTION OF CIGARS IN MASSACHUSETTS

### 22.01: Purpose

The Attorney General of Massachusetts promulgates 940 CMR 22.00 relating to cigar manufacturers and retailers pursuant to his authority in M.G.L. c. 93A, § 2(c). The purpose of 940 CMR 22.00 is to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts whereby:

(1) Massachusetts consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes by requiring the cigar industry to include health warnings on the package labels of cigars sold and distributed within Massachusetts and in the advertisements of such products within Massachusetts; and

(2) the incidence of cigar use by children under legal age is addressed by imposing requirements and restrictions on the sale and distribution of cigars in Massachusetts in order to prevent access to such products by underage consumers.

### 22.02: Scope

The Attorney General's regulations define unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a) and they do not legitimize acts or practices not specifically prohibited by 940 CMR 22.00. 940 CMR 22.00 is

designed to supplement existing regulations. All references in 940 CMR 22.00 to statutes and other regulations shall include amendments made to such statutes and regulations after the effective date of 940 CMR 22.00.

940 CMR 22.00 shall apply to any person who manufacturers, packages, imports for sale, sells or distributes within Massachusetts cigars and little cigars as defined in these regulations.

940 CMR 22.00 shall not apply to the manufacture, packaging, importation for sale or distribution within Massachusetts of any tobacco product other than cigars and little cigars as defined in 940 CMR 22.00.

22.03: Definitions

Adult-Only Retail Facility means a facility where the retailer ensures that no person younger than 18 years old is present or permitted to enter at any time.

Advertisement (including the terms "advertise" and "advertising") means any oral, written, graphic, or pictorial statement, made by, or on behalf of, any person who manufactures, packages, imports for sale or distributes or sells within Massachusetts cigars or little cigars, the purpose or effect of which is to promote the use or sale of the product. Advertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display or visual image of any kind, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigar or little cigars. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats, but does not include utilitarian items with a volume of 200 cubic inches or less. The terms "advertisement," "advertise," and "advertising" shall be

interpreted in a manner which is consistent with the definition of the same terms in the Attorney General's Retail Advertising Regulations, 940 CMR 6.00.

Brand Name means a brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigars or little cigars.

Cigar means any roll of tobacco wrapped in either leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq.), and as to which 1,000 units weigh more than three pounds.

Clear and Conspicuous shall be defined in a manner which is consistent with the definition provided by the applicable sections of the Attorney General's Retail Advertising Regulations, 940 CMR 6.00.

Distributor means any person who furthers the distribution of cigars or little cigars, whether domestic or imported, at any point from the original place of manufacture to the person who sells or distributes the product to individuals for personal consumption.

Hand rolled cigar means any cigar which is not a manufactured cigar.

Little cigar means any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq.) and as to which one thousand units weigh not more than three pounds.

Manufactured cigar means any roll of tobacco wrapped by machine in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 et seq.).

Manufacturer means any person, including any repacker and/or relabeler, who manufactures, fabricates, assembles, processes, or labels a finished cigar or little cigar.

Package means a pack, box, carton, container or individual wrapping of any kind in which cigars or little cigars are offered for sale, sold, or otherwise distributed to consumers.

Playground means any outdoor premises or grounds owned or lawfully operated by or on behalf of, the State, any State agency, or any political subdivision of the State, or any public, private or parochial school, any child day care center or any youth center, which contains any device, structure or implement, fixed or portable, used or intended to be used by persons under the age of 18 for recreational or athletic purposes including, but not limited to, play equipment such as a sliding board, swing, jungle gym, sandbox, climbing bar, wading pool, obstacle course, swimming pool, see-saw, baseball diamond, athletic field, or basketball court.

Point of sale means any location at which a consumer can purchase or otherwise obtain cigars or little cigars for personal consumption.

Retailer means any person who sells cigars or little cigars to individuals in Massachusetts for personal consumption, or who operates a facility located within Massachusetts where vending machines are located.

Sale or distribution shall be defined to include sampling or any other distribution not for sale.

Secret shopper program shall be defined to include, at a minimum, six visits per year to a retail sales outlet by a person retained by a retailer, where the person poses as a customer in order to ensure compliance by the outlet's employees with laws prohibiting the sale of tobacco to minors, with each visit made on a different day and at a different time, and, where practical, to a different outlet employee.

22.04: Labeling Requirements

(1) General Rule. It shall be an unfair or deceptive act or practice for any person to manufacture, package, import for sale or distribute within Massachusetts any manufactured cigar or manufactured little cigar the package ofwhich does not bear, in accordance with the requirements of 940 CMR 22.00, oneof the following labels:

WARNING: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug.

WARNING: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products.

(2) Label Format. It shall be an unfair or deceptive act or practice for any person to manufacture, package, import for sale or distribute within Massachusetts any manufactured cigar or little cigar the package of which fails to contain the warning statement required by 940 CMR 22.04(1) in the following format:

(a) On the front or top of the package, whichever surface area is larger, in a clear and conspicuous format, comprising at least 25% of the front or top panel of the package, with the warning statement capitalized as indicated in 940 CMR 22.04(1), with letters that are either white against a black background or black against a white background, and are in contrast with all other printed material on the package;

(b) The labels may either be printed directly on the package or preprinted, provided that any preprinted label is firmly attached to the package in such away that the surface of the label is destroyed before the label can be removed from the package;

(c) If other warnings are required by any other Federal, State, or local governmental entity, the total area of all required warnings need not exceed 25% of the front or top of the package, provided that the warnings required by 940 CMR 22.00 remain clear and conspicuous.

(d) Label Rotation. It shall be an unfair or deceptive act or practice for any person to manufacture or import for sale or distribution within Massachusetts any brand of manufactured cigar or little cigar unless the label statements required in 940 CMR 22.04(1) are rotated by each manufacturer or importer regularly in alternating sequence on the packages of each brand of manufactured cigars or little cigars manufactured by the manufacturer or importer and in any advertisements for each such brand of manufactured cigars or little cigars.

22.05: Advertising Requirements:

(1) General Rule. It shall be an unfair or deceptive act or practice for any person to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the advertising bears one of the warning statements specified in 940 CMR 22.04, rotated in accordance with the requirements of 940 CMR 22.04.

(2) Advertising Format. It shall be an unfair or deceptive act or practice for any person to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the warning statement required by 940

CMR 22.04 comprises 20% of the area of the advertisement and is in the format required by 940 CMR 22.04(2).

22.06: Point of Sale Restrictions

(1) Retail Sales Practices. Except as otherwise provided in 940 CMR 22.06(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices:

(a) sampling of cigars or little cigars or promotional give-aways of cigars or little cigars;

(b) breaking or otherwise opening any little cigar package to sell or distribute individual little cigars or a number of unpackaged or repackaged little cigars;

(c) distribution of cigars or little cigars through the mail, including redemption of coupons, credits and proofs-of-purchase, except as otherwise provided in 940 CMR 22.00;

(d) sale or distribution of cigars or little cigars if any apparel or other merchandise (other than cigars or little cigars) which bears a brand name is offered in consideration of the purchase.

(2) Retail Outlet Sales Practices. Except as otherwise provided in 940 CMR 22.06(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

(a) Selling cigars or little cigars in any manner other than in a direct, face-to-face exchange without the assistance of any vending machines or any other electronic or mechanical device, except as otherwise provided in 940 CMR 22.00;

(b) Failing to verify by means of valid government-issued photographic identification that each person purchasing cigars or little cigars is 18 years of age or older. No such verification is required for any person who appears 27 years of age or older.

(c) Using self-service displays of cigars or little cigars;

(d) Failing to place cigars and little cigars out of the reach of all consumers, and in a location accessible only to outlet personnel;

(e) As to any retailer who sells hand rolled cigars, or who displays for purchase manufactured cigars outside of their original package, failing to display a sign containing one of the warning statements required by 940 CMR 22.04 in a clear and conspicuous format, a minimum of 50 square inches in size, and in a location readily visible to the consumer.

(3) Retail Outlet Prevention Measures. It shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to sell cigars or little cigars to consumers without implementing all prevention measures reasonably necessary to prevent the sale of cigars or little cigars to consumers younger than 18 years old. A person is presumed to have complied with this provision if such person has implemented the following prevention measures:

(a) For any retailer who employs six or more persons, undertaking an in-house secret shopper program at all retail outlets as a routine part of its business, and implementing and operating the prevention measure set forth in 940 CMR 22.06(3)(b). A retailer who receives during any calendar year official written notification from a state or local

governmental authority of passing a tobacco compliance check is presumed to comply with this prevention measure for the next calendar year as to each retail sales outlet referenced in such notification as passing the compliance check;

(b) For any retailer who employs five or fewer persons, implementing and operating a training program for all employees who handle exchanges of cigars or little cigars regarding compliance with laws prohibiting the sale of tobacco products to minors. A model training program for tobacco retailers is available to all retailers at the Office of the Attorney General.

(4) Exceptions to Prohibited Retail Sales and Retail Sales Outlet Practices: The following retail sales and retail sales outlet practices are not unfair or deceptive:

(a) Mail-order sales, excluding mail-order redemption of coupons and distribution of free samples through the mail, that are subject to verification that the purchaser is not younger than 18 years old. Verification of age through the mail shall consist of, at a minimum, ensuring that the person to whom the product is being sent supplies a legible photocopy of a valid government-issued identification;

(b) Vending machines that are located in facilities licensed under M.G.L. c. 138, § 12, to serve alcoholic beverages for consumption on the premises, if the vending machine:

1. is equipped with a lock-out device that locks out sales from the vending machine unless the locking mechanism is released by an outlet employee. The release mechanism must not allow continuous operation of the vending machine

and must be out of the reach of all consumers and in a location accessible only to outlet personnel; and

2. is located within the immediate vicinity and exclusive control of outlet personnel such that all purchases are observable by the outlet employee(s) controlling the lock-out device; and

3. is posted with a sign stating that minors are not permitted to purchase tobacco and notifying customers of the lock-out device and identifying the outlet employee(s) to contact to purchase tobacco from the machine.

(c) Self-service displays that are located within adult-only retail facilities.

(d) Within an adult-only retail facility, distribution of no more than one free sample per day to an individual adult. With respect to little cigars, "sample" means one pack of little cigars in the smallest size package distributed by the manufacturer for individual consumer use. With respect to cigars, "sample" means one pack of cigars in the smallest size package distributed by the manufacturer for individual consumer use or, if such cigars are not distributed in packs, no more than five individual cigars.

(5) Advertising Restrictions. Except as provided in 940 CMR 22.06(6), it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

(a) Outdoor advertising of cigars or little cigars, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

(b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.

(6) Exception to Prohibited Advertising Practices. The following advertising practice is not unfair or deceptive: A retailer may place one sign no larger than 576 square inches and containing only black text on a white background stating "Tobacco Products Sold Here" on the outside or visible from the outside of each location where such products are offered for sale.

22.07: Relation To Other Laws

Nothing in 940 CMR 22.00 shall relieve any person from liability at common law or under Massachusetts statutory law to any other person.

Nothing in 940 CMR 22.00 shall be construed to preempt any existing law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of tobacco products, or which regulates the sale, use, or distribution of tobacco products. Nothing in 940 CMR 22.00 shall prohibit any city, town or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of tobacco products, or which regulates the sale, use, or distribution of tobacco products. Without limiting the generality of the foregoing, nothing in 940 CMR 22.00 shall prohibit any city, town, or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which imposes a monetary penalty, permit suspension or permit revocation for a violation of the local law. In cases where the ordinance, bylaw, regulation or rule is more restrictive than the provisions of 940 CMR 22.00, it

shall control to the extent of any inconsistency with 940 CMR 22.00.

22.08: Severability

If any provisions of 940 CMR 22.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 22.00 and the applicability of such provision to other persons or circumstances shall not be affected.

22.09: Effective Date

940 CMR 22.00 shall be effective on February 1, 2000.